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CONVEYANCER'S NOTEBOOK

ACCUMULATIONS AGAIN

VOLUME 21, P. 772, FORM 36

Provisions for accumulation are frequently inserted in modern settlements and wills and it is, perhaps, surprising that so many points on the Law of Property Act, 1925, s. 164, still remain obscure. At the end of last year (Vol. 21, p. 772) we published a precedent of a settlement of shares in a family company on the settlor's grandchildren. During the minorities or minority of the grandchildren or any of them, surplus income was directed to be accumulated. A correspondent writes to say that this type of provision has always worried him in case it is held to infringe section 164 (1) (d): "the duration of the minority or respective minorities only of any person or persons who under the limitations of the instrument directing the accumulations would, for the time being, if of full age, be entitled to the income directed to be accumulated." Under this paragraph, argues the writer, the only income which can be accumulated during the minority of any person is the income to which that person would for the time being, if of full age, be entitled; and accordingly it is not possible to give a general discretionary power of application of income during the minority of any one of a named class, coupled with a general power to accumulate the balance of any income not applied, for, assuming all of the class but one have attained full age, it is not possible to say that if that one minor were for the time being of full age, he would be entitled to the whole of the income which is directed to be accumulated. While the trustees have a discretion, it cannot be said that any child would be "entitled"

to any part of the income if of full age, for the trustees could allocate the income to another beneficiary.

The draftsman of the precedent concedes that this argument has considerable force, but he feels that it involves a fallacy: it requires the words "during the minority or respective minorities of the beneficiaries or any of them" to be construed as equivalent to "during the minority of the youngest of the beneficiaries." Under the limitations in the precedent, at any moment of time during the period of accumulation, it is true to say of the beneficiaries as a class that they would, if of full age, be entitled to receive the income directed to be accumulated. Accordingly, provided the accumulation is directed only during the minority or respective minorities of those beneficiaries (as is the case) it would appear that the requirements of sub-paragraph (d) are satisfied.

Nevertheless, it can hardly be said that the matter is beyond doubt—see *Re Ransome* [1957] 2 W.L.R. 556—and it might be thought desirable, in case the period is held to be excessive, to add a further proviso to clause 2 (2) of the precedent as follows:

> "Provided further that if the said period shall go beyond the period for the time being authorised by law for the accumulation of the income of the Trust Fund it is hereby declared that from and after the expiration of such part (if any) of the said period as shall (for this purpose) be valid the provisions of section 31 of the Trustee Act, 1925, shall apply to the intermediate income of the Trust Fund in lieu of the provisions in regard thereto of this and the preceding sub-clause hereof."

H.M. Land Registry Notice: Tunbridge Wells Sub-Office

We have received the following notice from the Chief Land Registrar:

> "1. Further to relieve congestion in H.M. Land Registry, Lincoln's Inn Fields, the registers, filed plans and index maps relating to the Counties of *Somerset*, *Devon* and *Cornwall* and the City and County of *Bristol* are being removed to Government Buildings, Forest Road, Hawkenbury, Tunbridge Wells, Kent on May 5 next, where as from that date the registration of title work arising from those areas will be done.
>
> "2. The Hawkenbury sub-office is already dealing with the work from the County Boroughs of *Hastings*, *Eastbourne* and *Oxford* and the Counties of *Sussex*, *Hampshire*, *Berkshire*, *Dorset* and *Wiltshire* and it would be a great convenience if

applications for registration, searches, etc., affecting titles in these areas and in those areas mentioned in paragraph 1 above could be sent there direct.

"3. Personal searches of the registers and index maps may be made at Hawkenbury but where it is desired to inspect these records in London they will be made available at Lincoln's Inn Fields at short notice.

"4. The full address of the Hawkenbury Sub-Office is:

H.M. Land Registry,
Government Buildings,
Forest Road,
Hawkenbury,
Tunbridge Wells,
Kent.

Telephone No. Tunbridge Wells 2780/91.

"*April 15, 1958.*"

Rates of Stamp Duty on Conveyances and Leases

We have to go back to before the Stamp Act, 1891, to find conveyances on sale totally exempt from *ad valorem* stamp duty. The original duty of 10s. per cent. was doubled in 1910 with an exception for cases where the consideration did not exceed £500. The Socialist Government in 1947 redoubled the rates, with some modifications up to £1,950. In 1952 and 1956 there were further reliefs to purchasers of property up to £5,000. It is proposed in the current Finance Bill to grant yet further reliefs. There will be no *ad valorem* duty on conveyances up to £3,500; the rate will be 10s. per cent. up to £4,500, £1 per cent. up to £5,250, £1 10s. per cent. up to £6,000, and thereafter at £2 per cent.

The new rates will apply to sales (including, of course, gifts) of property other than stock or marketable securities.

The same rates will apply to premiums on the grants of leases. Heretofore the lower rates have only applied if the rent, if any, does not exceed £20 per annum, but at last this figure is going to be raised—to £50.

The new rates come into effect on August 1. A fuller note will be found on page 218, *post*, and a note on, and precedent for, securing immediate benefit are to be found on pages 224 and 722, *post*.

PROBLEMS ON THE VARIATION OF SHAREHOLDERS' CLASS RIGHTS

By D. G. Rice, m.a., ll.b., ph.d., Barrister-at-Law

(*continued from p.* 136)

(B) Safeguards against any Unfair or Oppressive Variation of Class Rights

In our discussion of the means whereby class rights can be modified it has become manifestly evident that any alteration to class rights depends upon the will of the majority, sometimes on the will of the majority of the class whose rights are being modified, sometimes merely on the will of the majority of ordinary shareholders, regardless of whether or not it is their rights that are being affected. It remains, then, for us to examine what safeguards there are against oppressive use of the majority's powers.

The widest, yet least well defined, protection is to be found in the common law. If we begin by considering modifications purporting to be effected under a "variation of rights" clause we find clearly established the principle that, where resolutions are passed in accordance with such a clause, the majority must act bona fide in the interest of the class as a whole. ". . . all resolutions of this kind . . . must be passed bona fide and without sinister objects" (*o*). If a resolution is not so passed it will be invalid and in consequence will have no binding force on the minority. Inevitably, this rule poses the problem of where the onus of proof lies if the bona fides of the majority is called in question. Do the majority have to prove their good faith or does the burden of proof fall on the minority? Quite clearly, the authorities advocate the latter alternative (*p*). Indeed, the bringing of such proof is, in fact, a difficult matter. The courts are loth to impute *mala fides* to the majority, and tend only to do so where oppression is flagrant. Thus, allegations of *mala fides* on the part of the

(*o*) *Per* Malins V.-C. in *Re Wedgwood Coal & Iron Co.* (1877) 6 Ch.D. 627, at p. 635. See also *Goodfellow* v. *Nelson Line* (*Liverpool*), *Ltd.* [1912] 2 Ch. 324 and *British America Nickel Corpn.* v. *O'Brien* [1927] A.C. 369. Although both these cases relate, strictly speaking, to debenture-holders, the principle there laid down applies equally to shareholders, and they have been followed in *Northern Assurance Co.* v. *Farnham United Breweries* [1912] 2 Ch. 125 and *Last* v. *Buller & Co., Ltd.* (1919) 36 T.L.R. 35.

(*p*) See Lord Maugham in *Carruth* v. *I.C.I.* [1937] A.C. 707 (H.L.), at pp. 769, 770.

majority failed in *Goodfellow* v. *Nelson Line* (*Liverpool*), *Ltd.* (*q*), and *Northern Assurance Co.* v. *Farnham United Breweries* (*r*). But, where it was palpably evident that the majority were acting oppressively, as in *Re Wedgwood Coal & Iron Co.* (*s*) and *British America Nickel Corpn.* v. *O'Brien* (*t*), the court gave relief.

The principle that the majority of a class must act bona fide in the interests of that class inevitably raises a problem which it is appropriate at this juncture to consider. If the majority have to act bona fide in the interest of the class as a whole, it follows that each shareholder, in casting his vote, must subordinate his own interests to those of the class. Thus, there is a limitation on his right of voting, a right which is part of the property rights inherent in the ownership of a share, and which is normally unfettered in its exercise. How can this limitation be reconciled with a shareholder's normally absolute right of voting? The question was considered at some length by Viscount Haldane in *British America Nickel Corpn.* v. *O'Brien* (*t*) where he took the view that, if a shareholder enjoyed a right of voting by virtue of his membership of a class, he must keep predominantly in view the interests of that class (*u*), but that, if he enjoyed a right of voting as a general right of property attaching to the ownership of a share, his discretion was absolute (*v*). Now what is the precise effect of this rule on the problem we are considering? Clearly, where a variation of class rights is in issue, those entitled to vote enjoy this power as members of a class and by the rule we have just expounded are constrained to put before all else the interests of that class.

At this point it falls to us to consider to what extent, if at all, a member of a class must refrain from voting on an issue where his own personal interests are involved. The clearest case on this point is *Goodfellow* v. *Nelson Line* (*Liverpool*), *Ltd.* (*w*), where the court held that, in exercise of a power conferred by a trust deed on a majority of debenture-holders to bind the minority, each

(*q*) *Supra.*
(*r*) *Supra.*
(*s*) *Supra.*
(*t*) *Supra.*
(*u*) *i.e.*, of course, on all matters relating to that class, not on matters concerning the company as a whole, *e.g.*, the election of the directors.
(*v*) It is interesting to note that under the law of the U.S.A. it would appear that there is another restriction on the general right of a shareholder to vote according as his own personal interests dictate. For, where he wishes to enter into a contract with the company, he cannot exercise an absolute discretion as to the way in which he will vote in respect of that contract. He owes some sort of fiduciary duty to the members of the company as a whole (*Twin-Lick Oil Co.* v. *Marbury* (1875) 91 U.S. 587). Under English law, however, a shareholder owes no such duty.
(*w*) *Supra.*

debenture-holder, although he must act bona fide in the interests of the class, could still vote on matters involving his own personal interests. Nevertheless, the existence of such interests will furnish evidence that he may not have subordinated these to those of the class as a whole. Such was, indeed, the case in *British America Nickel Corpn.* v. *O'Brien* (*a*), where the court held that the majority of a class, who had approved an arrangement, had not acted bona fide in the interests of that class, but had given their consent to the scheme because of certain advantages which were secretly offered them in exchange for their sanctioning it. We may say, then, that when a member of a class exercises the powers conferred by a "variation of rights" clause, he may vote on any issue involving his own personal interests, but he must take care, nevertheless, always to subordinate these interests to those of the class to which he belongs.

Although we have concluded that, where the majority of a class purport to modify the class rights in accordance with the terms of a "variation of rights" clause, they must act bona fide in the interests of the class, is this the only protection afforded a minority by the common law? For the fact that the majority are acting bona fide will not necessarily safeguard the interests of the minority. An equivocal dictum of Parker J. in *Goodfellow* v. *Nelson Line* (*Liverpool*), *Ltd.* (*w*) suggests that some other protection also exists. For when he says (*b*),

> "The powers conferred by the trust deed on a majority of the debenture-holders must, of course, be exercised bona fide and the court *can no doubt interfere to prevent unfairness or oppression*" (*c*),

it is not clear whether the italicised words amount only to an explanation of the phrase "The powers . . . must be exercised bona fide," or whether they are meant to convey something more. However, indirect consideration is given to this problem by a group of cases specifically concerned with the power of the majority to alter the articles of association. Moreover, in that we have already shown in Part (A) that where a "variation of rights" clause does not exist class rights can be modified by directly altering the particular articles which define them (*d*), it is necessary for us sooner

(*a*) *Supra*.
(*b*) At p. 333.
(*c*) My italics.
(*d*) Even if this conclusion is wrong and it is not possible to vary class rights in the absence of a "variation of rights" clause, nevertheless, in view of the restricted interpretation put upon what constitutes a variation (as shown by such cases as *Re MacKenzie & Co.*, *supra*; *Greenhalgh* v. *Arderne Cinemas, Ltd.*, *supra*; *White* v. *Bristol Aeroplane Co.*, *supra*; and *Re John Smith's Tadcaster*

or later to consider the minority's safeguards against oppression where their rights are varied by this operation rather than by compliance with the provisions of a " variation of rights " clause (*dd*). It is convenient, then, if we now examine both problems at one and the same time.

The leading case on this point is *Allen* v. *Gold Reefs of West Africa* (*e*), where the articles were modified so as to give the company a lien on fully paid as well as unpaid shares. Lindley M.R. laid down the principle which has been adopted in all subsequent cases (*ee*):

> " . . . the power conferred by [section 10] . . . must be exercised not only in the manner required by law, *but also bona fide for the benefit of the company as a whole* " (*f*).

Although this principle has never been challenged by any subsequent authority, immense difficulty has surrounded the exact interpretation to be given to it.

It is submitted that the dictum admits of four possible interpretations. It might mean that:

(i) The majority must bona fide believe the alteration of the articles to be for the benefit of the company as a whole, whilst the court itself must regard it as being in fact beneficial to the company.

(ii) *Simpliciter*, the court must regard the alteration as being bona fide or genuinely for the benefit of the company as a whole. According to this view the words " bona fide " mean nothing more than " in fact." Thus, the only criterion is whether the alteration is, in the court's view, beneficial to the company, the majority's *bona* or *mala fides* being irrelevant.

Brewery, *supra*), it is still a relevant consideration to examine the extent to which protection is afforded against oppressive alterations to the articles. For many an alteration, although it does not involve a variation of class rights as a matter of law, certainly does so as a matter of business.

(*dd*) Even in this latter event it is still necessary to alter the relevant articles as well. See *supra*, note (*j*), at p. 128.

(*e*) [1900] 1 Ch. 656 (C.A.).

(*ee*) At p. 671.

(*f*) My italics. By " company as a whole " Lindley M.R. meant, of course, " the corporators as a body " as distinct from " the company as a commercial entity." This interpretation is implicit in the judgment of Astbury J. in *Brown* v. *British Abrasive Wheel Co.* [1919] 1 Ch. 290, at p. 296, and in that of Scrutton L.J. in *Shuttleworth* v. *Cox Bros. & Co. (Maidenhead), Ltd.* [1927] 2 K.B. 9 (C.A.), at p. 23, and has been specifically adopted by Evershed M.R. in the more recent case of *Greenhalgh* v. *Arderne Cinemas, Ltd.*, *supra*, at p. 291.

Further, this conclusion accords with the general practice underlying company law. Fundamentally, company law is only concerned with the shareholder and with no other element, however vital it might be to the company regarded as an economic unit. The position of the Inland Revenue, the management, the workers, the consumer, the local authorities, all of whom are vitally interested in the prosperity or otherwise of a company, is largely disregarded.

(iii) The majority must bona fide believe the alteration to be for the benefit of the company, whilst the court must be satisfied that the modification is reasonably capable of being regarded as beneficial.

(iv) *Simpliciter*, the majority must bona fide believe the alteration to be for the benefit of the company. According to this view, it is immaterial whether the alteration is in fact beneficial or whether it is capable of being regarded as beneficial to the company.

Each of these interpretations finds support in later authorities. Thus, although in *Brown* v. *British Abrasive Wheel Co.* (*g*) Ashbury J. adopted the first view, in the case of *Sidebottom* v. *Kershaw, Leese & Co.* (*h*) which succeeded it Lord Sterndale M.R. supported the fourth interpretation. And again, whereas Peterson J. in *Dafen Tinplate Co.* v. *Llanelly Steel Co.* (*i*) preferred the second construction, this view of the law was expressly rejected in the subsequent case of *Shuttleworth* v. *Cox Bros. & Co.* (*Maidenhead*), *Ltd.* (*k*) where the court adopted the third interpretation. In this maze of conflicting authority it is far from easy to assert with complete conviction the true meaning of Lindley M.R.'s dictum. However, two distinctive features appear in the judgments of all the authorities cited, *viz.*, (a) the requirement in all the cases except *Dafen Tinplate Co.* v. *Llanelly Steel Co.* (*l*) that the majority must bona fide believe the alteration to be beneficial to the company, and (b) the requirement in every case but *Sidebottom* v. *Kershaw, Leese & Co.* (*m*) that there be some other more effective limitation on the majority's power than (a) above. With respect to the first requirement it is possible to reconcile the dicta in the *Dafen Tinplate* case (*l*) with the judgments contained in the other cases if we bear in mind a point that will be enlarged upon later, namely, that the obligation of the majority to act bona fide will in practice be covered, to a large extent, by the further limitation (b) suggested by the cases. It is submitted, therefore, there is really no conflict between the *Dafen Tinplate* case (*l*) and the other three authorities on the question whether or no it is necessary for the majority to act bona fide in the exercise of their power under section 10. Moreover, as far as modifications effected under a "variation of rights" clause are concerned judicial authority overwhelmingly confirms the view that

(*g*) *Supra.*
(*h*) [1920] 1 Ch. 154 (C.A.).
(*i*) [1920] 2 Ch. 124.
(*k*) *Supra.*
(*l*) *Supra.*
(*m*) *Supra.*

the majority must bona fide believe the proposed alteration to be for the benefit of the whole class.

But what of the further limitation on the majority's powers? Although the judgments in *Brown* v. *British Abrasive Wheel Co.* (*n*) and *Dafen Tinplate Co.* v. *Llanelly Steel Co.* (*o*) suggest that alterations to the articles will be void if in the opinion of the court they do not in fact benefit the company, the principle laid down in *Shuttleworth* v. *Cox Bros. & Co.* (*Maidenhead*), *Ltd.* (*p*) expressly provides that the criterion is not whether the alteration is, in the court's opinion, beneficial to the company, but whether it is capable of being considered beneficial by a reasonable shareholder. According to the former view it is the court which decides whether an alteration is in the interest of the company, whilst according to *Shuttleworth's* case (*p*) the decision rests with the shareholders, subject to the court's right to rule whether the decision could reasonably have been arrived at. It is submitted that the conflict must be resolved in favour of the later case. *Shuttleworth* v. *Cox Bros. & Co.* (*Maidenhead*), *Ltd.* (*p*), is a Court of Appeal decision, and it expressly overruled the opinion of Peterson J. in the *Dafen Tinplate* case (*o*). Similarly, by implication it must also have overruled the contrary dicta in *Brown* v. *British Abrasive Wheel Co.* (*n*). Further, this view accords with the general practice of the courts in not trespassing on the preserves of the shareholders. For the courts constantly refuse to take upon themselves the management of companies.

We may conclude, then, that an objective examination of the dictum of Lindley M.R., as explained by the subsequent cases, shows that the power of the majority to modify the articles of association under section 10 is subject to two limitations:

(i) the majority must bona fide believe the proposed alteration to be for the benefit of the company, and

(ii) the proposed alteration must be such as could reasonably be supposed by a shareholder to be beneficial to the company (*q*).

Moreover, it is submitted that these two limitations will apply equally to the majority's power of modifying class rights in accordance with the provisions of a "variation of rights" clause, the only difference being that the class of shareholders concerned will be substituted for the company as a whole.

(*n*) *Supra.*
(*o*) *Supra.*
(*p*) *Supra.*
(*q*) In so far as this conclusion conflicts with the principle apparent in such cases as *North-West Transportation Co.* v. *Beatty* (1887) 12 App.Cas. 589, that each member is free to use his vote as he will without regard to any duty owed to the company as a whole, such a principle must clearly be modified accordingly.

Our interpretation, however, of Lindley M.R.'s dictum requires a little further elaboration. In practice, one of the ways of proving *mala fides* in the majority is to show that no reasonable shareholder could have considered the alteration beneficial. Admittedly, it is possible to establish the absence of good faith on the part of the majority by showing that the alteration in question, however reasonable on the surface, in fact conferred personal benefits on certain interests, *i.e.*, that it was discriminatory in its effect. Nevertheless, limitation (ii), to a large extent, covers limitation (i), and hence is of more practical importance. Thus, although there are two restrictions imposed on the majority's power the latter is of far greater consequence than the former.

But, quite apart from the common law, the minority shareholders are further protected by the Companies Act, 1948. For under section 210 an oppressed minority may present a petition to the court and the court has a wide discretion as to the relief it will grant. But a more specific safeguard is to be found in section 72. For under its provisions, where a modification of class rights is effected under a "variation of rights" clause, the holders of 15 per cent. in value of the issued shares of the class concerned may petition the court against a variation of their rights within twenty-one days of the resolution purporting to vary them, and the sanction of the court is necessary if the resolution is to be effective. The court will disallow the variation if, "having regard to all the circumstances of the case . . . the variation would unfairly prejudice the shareholders of the class represented by the applicant." Now, this section gives rise to an immediate problem. What protection does the section afford the minority of a class over and above that already provided by the common law? It is to be noted that advantage cannot be taken of it unless the holders of 15 per cent. in value of the issued shares of the class petition the court, whereas at common law relief can be obtained by a single shareholder. This factor suggests that section 72 adds nothing to the law. It has, therefore, been argued that the introduction of section 61 into the 1929 Act, corresponding to section 72 of the 1948 Act, has had the effect of replacing the common law; and it is a noteworthy point that all the cases cited to explain the common law principle occurred before 1929 (*r*). Nevertheless, against this it must be borne in mind that section 61 of the 1929 Act was presumably introduced to give the minority greater, not

(*r*) However, the common law principle was again considered and expressly approved in 1950 by the Court of Appeal in *Greenhalgh* v. *Arderne Cinemas, Ltd.* [1951] Ch. 286 (C.A.), a case not cited above.

less, protection. Further, in *Carruth* v. *Imperial Chemical Industries* (*s*) both Lord Blanesburgh and Lord Maugham seem to have thought that the common law was unaffected by section 61 (*t*).

If, then, we take the view that the common law is not replaced by section 72, we are left with the problem of deciding what additional protection section 72 gives a minority over and above that provided by the common law. Now, it will be remembered that, when we considered the protection afforded by the common law, we concluded not only that the majority must act bona fide in the interests of the class as a whole (a requirement which will obviously also apply in respect of section 72) but also that the alteration in question must be such as a reasonable man might consider beneficial to that class. It is submitted that, in deciding whether an alteration is unfairly prejudicial under section 72, the court will, with the help of the wide phraseology employed in the section ("having regard to all the circumstances of the case"), go even further, and will itself consider whether the alteration is beneficial. Thus, the court will not merely determine whether the alteration might reasonably be considered by a member of the class as being beneficial to the class as a whole, but will itself examine the alteration completely afresh, and take upon itself the functions normally discharged by the members of the class concerned. There is no authority for this view, but, if it be the true one, a definite point can be given to section 72. Whereas under the common law a single shareholder (*i.e.*, not merely the holders of 15 per cent. in value) is protected against an alteration where the majority have not acted bona fide in the interests of the class as a whole, and the purported alteration could not reasonably be regarded as beneficial to the class, those petitioning under section 72 (who must hold 15 per cent. or more in value of the shares and must comply with the other provisions of the section) have an additional protection in that the court may examine the purported alteration afresh, and itself decide whether the minority are being unfairly prejudiced.

But whether or no section 72 really offers to an oppressed minority any significant safeguard over and above that provided by the common law, one thing is at least clear. The minority shareholders, when faced with oppressive treatment at the hands of the majority, are not without some form of remedy both at common law and under the Companies Act. But it must always be remembered that the onus of proof rests with the minority and

(*s*) *Supra.*
(*t*) See particularly at pp. 764, 765.

in practice their legal safeguards may well prove more illusory than real. Moreover, where class rights are directly altered by modifications to the articles, questions of "bona fides" and "benefit" must be considered in relation to the interests of the members as a whole and not those of the particular class whose rights are being affected.

PROTECTION NOTICES UNDER THE TOWN AND COUNTRY PLANNING ACT, 1954, S. 33

By R. Geoffrey Rowley, ll.d., Solicitor

It is probable that conveyancers accustomed to the simple, uncomplicated days before 1948 look upon the Town and Country Planning Act, 1947, with the same healthy suspicion as that with which their fathers regarded the new-fangled convolutions of the Law of Property Act, 1925. Their natural distaste for a statute of 120 sections and 11 schedules (*a*), with a mass of subsidiary legislation, is exacerbated by the fact that this more than any other single factor has wrought a change in conveyancing practice by making pre-contract inquiries a prudent preliminary to the exchange of contracts in all but the most straightforward cases. The intricacies of the law have increased; the responsibility of the conveyancer has increased; the volume of work involved in each conveyancing transaction has increased; only the remuneration remains static.

The latest of the tribulations to be visited upon the profession is section 33 of the Town and Country Planning Act, 1954. Only the intimate effects of this section on conveyancing practice justify its translation from journals specialising in planning matters to the chaste pages of *The Conveyancer*. The problems of section 33 call for consideration under five heads: compensation before 1955, the machinery of section 33, the effects of section 33 protection, the limits on section 33 protection, and a conclusion and criticism.

Compensation Before 1955

The general effect of sections 50 and 51 of the 1947 Act was to substitute "existing use value" (*b*) for the 1939 value as the measure of compensation on a compulsory purchase. This existing use value ignores any depreciation in value attributable to land being designated by a development plan as subject to compulsory

(*a*) Not to mention the Town and Country Planning (Amendment) Act, 1951, the Town and Country Planning Act, 1953, and the 72 sections and 8 Schedules of the Town and Country Planning Act, 1954.

(*b*) "Existing use value" under the 1947 Act could refer to at least three different things, and the expression is criticised at [1951] J.P.L. 141. It is, however, adopted by the 1951 Act, s. 69 (1).

purchase (*c*) but must take into account the possibility of the exercise of two rights still remaining to the landowners:

1. The right to carry out operations which by virtue of section 12 (2) of the 1947 Act do not constitute development and for which, therefore, no planning permission is necessary. The most important of these is the change of use of land or buildings within the confines of a "use class" as defined by the Town and Country Planning (Use Classes) Order, 1950.

2. The right to carry out any class of development specified in the Third Schedule to the 1947 Act, *i.e.*, the land is valued on the assumption that planning permission will be granted for the exercise of "Third Schedule tolerances" (*d*). The most important of these are the right to rebuild buildings destroyed or damaged, and the right to enlarge all buildings by 10 per cent. of their cubic capacity and to enlarge dwelling-houses by 10 per cent. or 1,750 cubic feet, whichever is the greater (*e*).

Subject to these residual rights of landowners, compensation is to be calculated on the assumption that planning permission will not be granted for any development (*f*), that is, "the value of the land must be fixed on the assumption that development will not be permitted. It is to be a permanent restriction and if there is a permanent restriction on the development of the land, no development can ever take place" (*g*).

Contravening Development

It is never unlawful to carry out operations without planning permission, and the local planning authority's only remedy is entry and demolition (*h*). Such development cannot therefore be ignored under rule 4 of section 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919, which provides that any increase in

(*c*) 1947 Act, s. 51 (3).

(*d*) 1947 Act, s. 51 (2). There are three exceptions: (1) where compensation is paid in respect of the refusal, conditional grant, revocation or modification of a permission, (2) where an order for the removal of a building or discontinuance of a use is made and compensation paid, and (3) where the development would not comply with any other enactment or by-laws: s. 112 (1).

(*e*) Under another head is the right to interchange uses within the classes specified by the Town and Country Planning (Uses Classes for Third Schedule Purposes) Order, 1948, but as these classes are very similar to those contained in the Town and Country Planning (Use Classes) Order, 1950, this "tolerance" extensively overlaps the exemption from "development" conferred by s. 12 and is of very little practical value.

(*f*) 1947 Act, s. 51 (2).

(*g*) *Per* Lord Goddard C.J. in *Sampson's Executors* v. *Nottinghamshire County Council* [1949] 2 K.B. 439. This interpretation equates the absence of planning permission with the impossibility of development, and seems to assume that the possibility of future contravening development is for compensation purposes to be ignored.

(*h*) 1947 Act, s. 21 (1).

the value of land due to a use thereof which could be restrained by any court or is contrary to law is to be disregarded, although the possibility of demolition would clearly have to be taken into account under rule 2 in assessing the market value price.

A contravening use is not unlawful *ab initio*, but will become so after non-compliance with an enforcement notice (*i*). If, therefore, any enforcement notice is in operation at the date of the notice to treat, the value of the contravening use will be entirely ignored under rule 4, but where no such notice has been served the valuation must take into account the possibility of future enforcement action (*k*).

After the expiration of four years from the date of the unauthorised development, there is no further possibility of enforcement action (*l*) and the contravening development becomes part of the existing use for all purposes.

It is suggested that the value of a contravening development of recent origin is negligible and that the value of the possibility of future contravening development being allowed to remain is nil. It would indeed be absurd if the value of development potential under a planning permission already granted were to be ignored, as in many cases it is under section 51 (4) of the 1947 Act, whilst the value of development potential under a future contravening use were to be recognised.

Existing Permissions

Section 51 (4) of the 1947 Act (as amended by section 34 of the 1954 Act) provides that, where planning permission (other than for Third Schedule development) has been granted before the date of the notice to treat then, unless a development charge has been paid (*m*) or the development is within section 78 (unfinished buildings) or section 80 (dead-ripe land) of the 1947 Act or within Schedule VI to the 1954 Act (*n*), "the value of the interest to which the notice to treat relates shall be calculated as if that permission had not been granted."

(*i*) 1947 Act, s. 24 (3). Once it is established that the use is unlawful, it appears to be immaterial whether or not it could be restrained by the court, although in certain cases it could be so restrained—*Att.-Gen.* v. *Bastow* [1957] 1 Q.B. 514.

(*k*) *Cf. Higham* v. *Havant and Waterloo U. D. C.* [1951] 1 K.B. 509, affd. [1951] 2 K.B. 527.

(*l*) 1947 Act, s. 23 (1).

(*m*) And not repaid or repayable under the 1953 Act. Notwithstanding the abolition of development charges by this Act, they are still deemed to be payable for the purposes of s. 51 (4): 1953 Act, s. 3 (1) (b).

(*n*) Schedule VI covers a number of cases concerning land of local authorities, development corporations, statutory undertakers, the National Coal Board and charities.

This subsection has not yet received judicial construction and there are two possible interpretations:

1. *The literal interpretation.* If it is assumed that planning permission has not been granted for a development which has been completed, then it must follow that for valuation purposes the development is a contravening development subject to enforcement action under section 23 within four years (*o*). It is true that no enforcement action can in practice be taken because there is in fact a planning permission in force, but the subsection postulates a hypothetical set of circumstances, and on the hypothesis that there is no planning permission, a hypothetical enforcement notice can be served. If it is argued that the subsection merely requires you to assume the non-granting of planning permission and not its consequences (*p*), it could equally forcibly be argued that a valuation on the basis of the possibility of a future (hypothetical) contravening development, coupled with an (actual) impossibility of enforcement action, would remove all meaning from section 51 (4), since the value of a planning permission would have to be taken into account in every case.

2. *The ministerial interpretation.* The Minister of Housing and Local Government has stated (*q*) that no court would accept the literal interpretation of the words "as if that permission had not been granted" but "would construe the whole situation on a basis of reasonableness . . . . we are quite certain of it, that any court would construe it as meaning that the value of the building (*r*) would be included in the existing use value of the land." The official view has been criticised (*s*), and since the value of an existing planning permission, which is removed from the compensation claim by section 51 (4), can in most cases easily be restored to it on a sale by the use of section 33 procedure, it is submitted that

(*o*) Prior to the ministerial statements, *infra*, it was certainly believed that a change of use following a planning permission would be ignored: [1949] J.P.L. 138. See also Williams on *Title*, 2nd ed., p. 121, to the effect that s. 51 (4) "prevents development made in pursuance of a permission to develop being taken into account in the assessment of compensation."

(*p*) See Official Report, Standing Committee A, December 16, 1952, col. 49, where the Minister said he was advised that "the existence of the permission is an effective ban to enforcement. The value of any building erected or use begun in accordance with a permission will therefore be included in the existing use of the land."

(*q*) Official Report, Standing Committee A, December 17, 1952, col. 77. See also Ministry of Health Circular 129/38: "Any planning permission already granted, but not acted upon, is to be ignored in assessing the value of the land for compulsory acquisition."

(*r*) *i.e.*, a building erected with planning permission prior to the date of service of a notice to treat.

(*s*) See [1953] J.P.L. 297.

it would be a wise precaution to adopt section 33 procedure in all cases where a planning permission has been granted, except those in which the development has been carried out at least four years before the sale.

The burden which landowners bear under the 1947 Act is twofold: first, compulsory purchase compensation will not in general reflect the development potential of their property, *i.e.*, the possibility of increased value following upon a future planning permission, since it is assumed that such permission will not be granted; and secondly, it will not reflect the "planning permission potential," *i.e.*, the possibility of increased value following upon an existing planning permission, although it will (if the official view is correct) reflect the value of any completed development and will ignore only the value of a planning permission granted but not yet acted upon.

The 1954 Act sets out to alleviate this burden in four ways:

1. Section 31. The unexpended balance (*t*) of an established claim for loss of development value is now added to the existing use value for compensation purposes.

2. Section 32. Where an owner is prejudiced by the value of a planning permission being excluded from the compensation by reason of section 51 (4), the increase in value due exclusively to the erection of buildings or execution of works under a planning permission (but not the increase due to the value of the planning permission itself) is to be added to the existing use value. This addition is subject to an increase or reduction according as to whether the existing use value of the land has been depreciated or appreciated by the development (*u*).

3. Section 33. Where a local authority notifies a prospective purchaser that there is no compulsory purchase in contemplation within the next five years, the value of a planning permission granted before the local authority's notice is added to the existing use value if the land is subsequently purchased and is compulsorily acquired within those five years.

4. Section 35, the "Pilgrim section." Where there is no established Part VI claim under the 1947 Act to give rise to an unexpended balance for the purposes of section 31, an

(*t*) Which the typist, by a happy mistake in copying this Article, transcribed as "the unexpected balance."

(*u*) 1954 Act, s. 32 (3). This provision assumes the correctness of the ministerial interpretation of s. 51 (4), since, if valuation is to assume a worthless contravening development, the compensation if buildings had been erected cannot vary from that if they had not been erected. But as there is no clause of reference (as, *e.g.*, in the 1951 Act, s. 4 (2)), the 1954 Act cannot assist in construing the 1947 Act.

ex gratia payment may still be made on the issue of a Treasury certificate stating the notional section 31 addition.

Sections 31 and 33 are alternatives, and the landowner can claim under whichever section will afford him the more compensation.

MACHINERY OF SECTION 33

On any compulsory acquisition in pursuance of a notice to treat served after 1954, the value of a planning permission is in some cases restored to the ambit of the compensation claim, but to achieve this enhancement of the compulsory purchase value four conditions must be fulfilled:

1. Any person can apply in writing to the local council (*v*) for a notice stating whether or not the council propose to acquire (whether compulsorily or otherwise) any interest (*a*) in the whole or part of particular land within the next five years, or have been notified by any public authority of a proposal so to acquire any such interest. The first condition is fulfilled if the applicant receives a negative reply to his inquiry, and if the council fail to reply within twenty-eight days they are deemed to have given a negative reply (*b*). Such a reply will for convenience be referred to as a "protection notice."

2. The applicant must, within three months after the service of the protection notice, either enter into a bona fide contract (*c*) for, or complete the purchase of, an interest in the whole or part of the land specified in the protection notice.

3. The applicant must, also within three months after the service of the protection notice, notify the council of the

(*v*) *i.e.*, the London County Council or the council of a county borough or county district.

(*a*) "Interest in land" means an interest in fee simple or a tenancy (not being a mortgage term or tenancy by attornment) created either immediately or mediately out of the freehold, whether by a lease, underlease, agreement for lease or underlease, tenancy agreement or enactment: 1954 Act, s. 69.

(*b*) It appears that it was assumed in the House of Lords during the passage of the 1954 Act that, even if a negative reply is received, the council may amend this within 28 days of the receipt of the original application, in which case the purchaser is not safe in exchanging contracts until the 28 days have expired: [1955] J.P.L. 27, 419.

(*c*) "Contract" means either a contract in writing, or a contract attested by a memorandum in writing signed by the parties or their agents. If a contract is not in writing, it is deemed to be entered into when the memorandum is signed: 1951 Act, s. 69 (6). The contract must either have been completed, or still be in force, at the date of the first compulsory purchase notice. There is no requirement that the completion must be of a bona fide sale, and it has been suggested that an owner may arrange fictitious sales to achieve the protection of the section: [1956] J.P.L. 156, but see Acquisition of Land (Assessment of Compensation) Act, 1919, Sched. II, Part 3, para. 8. A purchase by a company from an associated company is excluded from the operation of section 33 by subs. (2), proviso (ii).

making of the contract or of the completion, as the case may be.

4. The interest purchased by the applicant in all or part of the land specified in the protection notice must become the subject of a compulsory purchase (*d*), and the first notice required to be published or served in connection with such purchase must be published or served before the end of five years from the date of service of the protection notice.

Effects of Section 33 Protection

The only effect of section 33, where its procedure is used, is that compensation on a compulsory purchase within five years of the notice is to be assessed without applying section 51 (4) of the 1947 Act, *i.e.*, that a planning permission in force at the date of the protection notice is to be taken into account in calculating the compensation.

It should be noted that the applicant for the protection notice need not necessarily have been the applicant for the planning permission, but that the applicant for the protection notice must himself either contract for, or complete, the purchase of an interest in the relevant land.

Whilst it is clear that the section 33 procedure is of limited application, it is suggested that the limits are wider than is commonly believed. The procedure is of value only in cases where a planning permission has been granted before the date of the protection notice, but it must be borne in mind that "planning permission" means (*e*) the permission for development which is required by section 12 of the 1947 Act, and that such permission may be granted either by a General or Special Development Order (*f*) or by the local planning authority upon application being made (*g*). By virtue of Article 3 of the Town and Country Planning General Development Order, 1950 (hereinafter referred to as "the G.D.O."), some planning permissions are in force with regard to all land in the country; this does not mean that application for a protection notice should be made on every sale, because the "development order potential" of many properties will be negligible, but it does mean that, since the fee for a protection notice is only five shillings (*h*), application for such a notice should

(*d*) This will not include a statutory vesting: 1954 Act, s. 69 (1).
(*e*) 1947 Act, s. 119 (1).
(*f*) 1947 Act, s. 13. There are special orders for New Towns, Eastbourne, and the County of Durham.
(*g*) 1947 Act, s. 14.
(*h*) 1954 Act, s. 33 (4).

be made in any case where there is doubt as to whether the "development order potential" is of value or not.

It is necessary to consider the terms of the Third Schedule and the G.D.O. in each individual case, because planning permission (granted by the G.D.O.) for development within the Third Schedule does not increase the compensation. The existing use valuation is on the basis that permission for Third Schedule development will be granted, and that if granted it will not be excluded by section 51 (4). Accordingly, the G.D.O. permissions in respect of agricultural and forestry land, and the "enlargement" permission for houses, are of little value, being substantially covered by Third Schedule tolerances.

An example will illustrate the possible value of a protection notice where there is no special planning permission in force. If a tripe shop is situate in a residential area where the gastronomic qualities of tripe have ceased to be highly regarded, its market value as a potential grocery store may be considerably higher than its existing use value, which assumes a permanent restriction to the sale of tripe. Apart from section 33, a purchaser of the shop who pays the market value with a view to conversion into another type of shop, and who is served with a compulsory purchase notice before the change of use is effected, will receive only compensation based on the existing use value, because by section 51 (4) the planning permission for change of use granted by the G.D.O. will not be taken into account. If, however, a protection notice is obtained under section 33, the compensation on any compulsory purchase within five years will take into account the value of the planning permission.

Limits on Section 33 Protection

Although section 33 protection will only avail a purchaser if a compulsory purchase notice is served within five years, since a purchaser can never be certain that this will not happen he should apply for a protection notice in every case where the value of the property might include any planning permission potential.

It is a condition of the operation of the notice that the applicant must within three months either enter into a contract for or complete the purchase of an interest in the relevant land, but the Act is silent as to the meaning of "purchase" in this context. In conveyancing legislation, such as the 1925 Property Acts, "purchase" generally includes the grant of a lease, although in its popular meaning it may be limited to buying an interest already in existence.

The Ministry of Housing and Local Government have expressed the view that section 33 does not apply where an agreement for a lease is entered into under which the intended lessee is to build a house and be granted a lease when a certain stage of building has been reached (*i*). Since such an agreement clearly creates an "interest in land" (*k*), the Ministry's view seems to be that "purchase" in section 33 must be interpreted in the same singular manner as the phrase "became landlord by purchasing" in the Rent and Mortgage Interest (Restrictions) Act, 1933 (*l*), was interpreted in *Powell* v. *Cleland* (*m*).

This view can be criticised on at least four grounds:

1. Although the judgments in *Powell* v. *Cleland* do not draw any distinction between leases at a premium and leases at a rack rent, there was no premium involved in that case, and Asquith L.J. has since observed (*n*) that the decision was "that purchasing meant 'buying' in the popular sense, and was not a term apt to describe acquiring a lease of a reversion dependent on an existing tenancy, unless, indeed, a premium—that is a purchase price—was paid for the reversionary lease."

2. In section 33 the word "purchase" is a noun which has well-known conveyancing connotations, unlike the gerund "purchasing" which is a popular expression.

3. In *Powell* v. *Cleland* one ground of the decision was that the Rent Acts "have characteristically preferred a simple and popular means of expression"—an encomium not yet applied to the Planning Acts.

4. A purchaser of a long lease at a premium requires the same protection as the purchaser of a freehold or an existing leasehold interest against the danger of an early compulsory purchase at the reduced "existing use value" excluding the value of an existing planning permission (*o*).

But whilst it is suggested that "the purchase of an interest in land" is not limited to an existing interest, until the point is authoritatively settled it will be prudent to ask where possible for

(*i*) See [1956] J.P.L. 81. Construction of statutes by ministerial statement seems to the writer to be a novel procedure, and the curious will wonder why, if the Ministry are so certain in their views, they did not arrange for them to be unequivocably represented in the wording of the Acts.

(*k*) As defined by 1954 Act, s. 69; see footnote (*a*), p. 182, *supra*.

(*l*) 1st Sched. para. (h).

(*m*) [1948] 1 K.B. 262, where "the Court of Appeal imputed a remarkable intention to Parliament"—(1948) 64 L.Q.R. 17.

(*n*) In *Lucas* v. *Lineham* [1950] 1 All E.R. 586, at p. 588.

(*o*) See [1955] J.P.L. 28 and Emmet on *Title*, 14th ed., Vol. 2, p. 103. In fact, the Town and Country Planning (Minerals) Regs., 1954, r. 22, grants this protection to a lessee under a mining lease.

a conveyance of the existing interest rather than a lease. It will probably not avail a purchaser to arrange for a lease to a nominee from whom he will purchase the leasehold interest (*p*), since by virtue of the Acquisition of Land (Assessment to Compensation) Act, 1919 (*q*), the Tribunal must not take into account any interest in land if they are satisfied that the creation of the interest was not reasonably necessary and was undertaken to obtain or to increase compensation.

Criticism

The writer is not concerned in this present article with the moral implications of government legislation, but, leaving these aside, the criticism of the present state of the law must be threefold:

1. The present legislation has left scope for two large doubts as to its meaning and effect which remain to be resolved: whether an executed development carried out under a planning permission is in fact saved from the effects of a hypothetical absence of permission under section 51 (4), and whether section 33 procedure is available to lessees. The first of these doubts has been resolved to the Minister's satisfaction, but since the principle of *stare decisis* can scarcely apply to a court decision by ministerial prejudgment, it is to be regretted that the opportunity was not taken in the 1954 Act to put the matter beyond all question.

2. The decision whether a protection notice should be obtained or not depends on matters of valuation rather than questions of law, and, since experienced valuers (*r*) must find it difficult to prognosticate a problematical enhancement in value due to G.D.O. permissions as at the date of a future compulsory purchase which may never take place, a legal adviser may find the task virtually impossible. In the result very many protection notices may be quite properly obtained, with attendant trouble, delay and expense, which will prove to be useless because on values assessed at a future date the planning permission potential is found to be worthless.

3. Section 33 is designed to cover a relatively infrequent combination of circumstances: where planning permission has been granted before a purchase and a compulsory purchase supervenes within five years. No action by a prospective purchaser is necessary to secure the benefits of sections 31, 32, and 35, and for the

(*p*) As suggested in (1955) 220 L.T. 228 and [1956] J.P.L. 81.
(*q*) Sched. II, Pt. 3, para. 8.
(*r*) The R.I.C.S. Memo, on the 1947 Act (paras. 198 and 199), points out that land is seldom sold subject to the hypothetical restriction on development assumed by the Act, and that the idea of an artificial basis of valuation is repugnant to most valuers because the resulting values cannot be related to actual transactions.

limited class of case envisaged by section 33 the procedure is unnecessarily cumbersome. One would have thought that an expansion of Enquiry No. 19 in the local authority's printed enquiry form (CON 29C), accompanied by an abolition of the requirement that the applicant for the protection notice must also be the purchaser, would relieve practitioners of having to guess whether G.D.O. permissions are of value in any case, and would tend towards the neglected virtues of economy and expedition.

Conclusion

1. On every sale where the planning permission potential could have any value, the prospective purchaser should, whenever possible, call for a conveyance or assignment, rather than a lease; but where this is not possible, he should still apply for a protection notice prior to the grant of a lease to guard against the possibility of the Minister's powers of precognition being defective.

2. In every case where there is an express planning permission in force which has not been acted upon, or which has been acted upon only within the previous four years, a purchaser should obtain a protection notice. Where he intends to develop under an express planning permission, his timetable must be:

(1) To obtain the planning permission.

(2) To apply for a protection notice, and wait for twenty-eight days from the date of receipt of the application, whether or not a negative reply is received earlier, to guard against the possibility of an amended reply.

(3) If a protection notice is served (or is deemed to be served by reason of the Council's failure to reply), to exchange contracts and to notify the council of such exchange within three months of the service of the notice. The applicant for the protection notice must be the contractual purchaser, but need not be the ultimate purchaser.

If the contract precedes the planning permission and protection notice, it should be made subject to the grant of permission and to the service of a negative protection notice; in such a case the purchase should be completed and the council notified within three months of the service of the notice, and the conveyance or assignment should be taken in the name of the applicant for the protection notice.

3. It is impossible to be dogmatic about the value of G.D.O. permission potentials, but a protection notice should, in general, be obtained in the following cases:

(1) On the sale of a restaurant or "special shop" (*s*), or of any type of shop which has within the previous four years been used as a restaurant or "special shop" (*t*).

(2) On the sale of an industrial building (*u*).

(3) On the sale of land whose value would appreciate if it were fenced (*a*).

(4) On the sale of a dwelling-house whose value would be materially improved by the erection of ancillary buildings (not including a garage) within the curtilage (*b*). It is unlikely that a terrace house will have any "G.D.O. potential" under this head, and in only a few cases will any appreciable potential be annexed to a detached or semi-detached house.

(5) On the sale of any land which has a remunerative temporary use, *e.g.*, as the site of a travelling circus or fairground (*c*).

(*s*) *i.e.*, a fried fish shop, tripe shop, shop for the sale of pet animals or birds, and catsmeat shop.

(*t*) G.D.O. Schedule, Class III.

(*u*) Three factors have to be considered: (1) permission for the installation of railways, services, plant and machinery under G.D.O. Schedule, Class VIII, (2) the fact that the "enlargement tolerance" under Class VIII is somewhat different from the Third Schedule tolerance, and (3) permission to change use from a general industrial building to a light industrial building under Class III.

(*a*) G.D.O. Schedule, Class II, para. 1.

(*b*) G.D.O. Schedule, Class I, para. 2.

(*c*) G.D.O. Schedule, Class IV, permitting use of land for any purpose for not more than 28 days in any calendar year, with power to erect or place movable structures on the land for the purposes of that use.

THE CONTROL OF BORROWING

By Gerald Dworkin, ll.b., Solicitor

" There are few ways in which a man can be more innocently employed than in getting money "

—*Samuel Johnson.*

Introduction

It is a strange reflection upon the modern age of economic crisis and strict control that there are many people anxious to borrow money yet unable to do so because the economic policy of the country has ensured that there are few lenders available; and other people who have managed to find a willing lender, yet are still unable to accept a loan, because the economic policy of the country forbids the borrowing of too much money without the consent of a Government Department. Until very recently, the problem of a prospective borrower was to find a lender in a comparatively free and *laissez-faire* State; once that was done, the problem was virtually solved. The position now is that the Government can, by the imposition of economic " credit squeezes," make the prospective borrower's task a thousand-fold more difficult; and once he succeeds he may then be faced with the problem of obtaining the consent of the Treasury to borrow the money he has so diligently found.

This article is not proposed to be a comprehensive treatise upon the provisions relating to the control of borrowing. That task still remains open. What the article does aim at is to look at the law relating to the control of borrowing, keeping in mind the way that the small business man, *e.g.*, a comparatively small builder and estate developer, or a private company, is affected. When does the small building firm have to obtain Treasury consent to borrow? When will it not be necessary? How can the legal provisions be used to the firm's best advantage?

It may properly be asked why it should be necessary to go to great lengths to interpret difficult law, when all that is necessary in case of doubt is to apply to the Treasury for consent to borrow. Admittedly, at a time when Treasury consent can easily be obtained, there seems to be little point in taking a risk of infringing the law and exposing oneself to a penalty because of the obscurity of the provisions. But who is in a position to gauge accurately the policy of the various Treasury Departments from time to time?

How can one say that because Treasury consent has been given for the borrowing of money for the development of maisonettes on three occasions, it will be given for the projected development on a fourth occasion?

No matter how obscure the law may be, an attempt to interpret it should always be made rather than apply for Treasury consent where it is not necessary. Further, the small business man may be placed in an awkward position if he is refused Treasury consent in a case where his legal adviser is of the tentative opinion that it is not necessary.

The Parent Act

The present law stems from the Borrowing (Control and Guarantees) Act, 1946.

Section 1 of the Act gives the Treasury power to make orders for regulating any of the following transactions:

(a) The borrowing of money in Great Britain where the aggregate amount borrowed under the transaction in question, and any other amount borrowed by the same person in the previous twelve months, exceeds £10,000. (But it is expressly provided that this provision shall not apply to the borrowing of money by any person, other than a local authority, in the ordinary course of his business from a banking undertaking. This will be discussed later.)

(b) The raising of money in Great Britain by the issue of shares whether in Great Britain or abroad.

(c) The issue of any shares, debentures or other securities by a company or Government outside Great Britain if the securities are to be registered in Great Britain; and the issue, even abroad, of any securities by a company registered in Great Britain.

(d) The circulation in Great Britain of any offer for subscription sale or exchange of securities of a foreign company or Government.

The powers conferred by the Act are deliberately wide and comprehensive. It is the modern tendency of legislation conferring powers of sub-legislating to confer them to the widest possible extent. This ensures that whatever laws and orders are subsequently passed, they all come within the scope of the parent Act. Thus, the 1946 Act lays the framework, and the substance of borrowing control is contained in the Control of Borrowing Order, 1947, as amended by the Control of Borrowing (Amendment of Exemption Provisions) Order, 1949, the Control of Borrowing

(Amendment) Order, 1955, the Control of Borrowing (Amendment) Order, 1956, and the Control of Borrowing (Amendment) (No. 2) Order, 1956.

The Control of Borrowing Order, 1947

Paragraph (1) of Article 1 provides as follows:

> "Subject to the exemptions contained in Part II of this Order, a person shall not, without the consent of the Treasury, borrow money in Great Britain where the aggregate of the amount of money borrowed and of any other amounts borrowed in Great Britain by that person in the previous twelve months (including any period before the coming into force of this Order) exceeds Ten thousand pounds."

Thus the parent Act states that the Treasury may make orders for regulating transactions in excess of £10,000, and the first Order states that, subject to specified exemptions, all borrowing in excess of £10,000 requires consent.

But paragraph (2) of article 1 states that the Article shall not apply to certain specified borrowing:

> "(a) borrowing by any person, other than a local authority, if the borrowing is in the ordinary course of his business and is from a person carrying on a banking undertaking."

This specific exemption is declaratory only, since the parent Act expressly exempts this (proviso to section 1 (1) of the Borrowing (Control and Guarantees) Act, 1946). The exemption is clearly of great importance, since if Treasury consent were required for an overdraft every time the aggregate amount of withdrawals exceeded £10,000 in twelve months, then much important trade in the country could become crippled. The extent of this exemption lies in the interpretation of "in the ordinary course of business." Obviously, the wider the scope of one's business or businesses, the greater is the opportunity to dispense with Treasury consent. But the ordinary individual or firm can only stretch the meaning of business to a limited extent. To claim that no consent is required for borrowing in (what is to the borrower) an unusual transaction, because it is "in the ordinary course of business," is too difficult and dangerous, since in spite of the apparent lack of judicial discussion on the phrase, its general meaning is clear. If an individual wanted to borrow in excess of £10,000 for the purposes of a capital transaction not in the ordinary course of his business, he might attempt to widen the scope of his business and claim that the borrowing was "in the ordinary course of his business." However, there

might be unpleasant tax repercussions for the borrower, since the taxing authorities might also now deem the transaction to be a business one. The absence of Treasury consent could possibly operate as an estoppel in favour of the Inland Revenue!

However, the limited company has tremendous scope here. The memoranda of most companies now express their objects in the widest and most extensive terms, and often contain a declaration that all the objects of the company shall be deemed to be main objects (*a*). Thus a company with a comprehensive memorandum can borrow money from a banking undertaking for almost any purpose, and any purpose will be deemed to be a borrowing "in the ordinary course of business." However, the exemption only applies to borrowing from "banking undertakings." Since the major banking undertakings usually, of necessity, follow the economic directives of the Bank of England and the Government, there seems little chance of Treasury control of borrowing being abused and weakened by large-scale loans from banking undertakings. However, it is possible for a syndicate with the necessary capital and enterprise to form a banking undertaking with an important, although secondary, purpose of making frequent and large loans to traders and firms in the ordinary course of their business. The need for Treasury consent would be reduced and the control of the Treasury would be lessened. Also, the growth of banking syndicates could spread, especially if high rates of interest prevailed. Any abuse could only be remedied by Act of Parliament, since the exemption is entrenched in the 1946 Act. The abuse of this exemption, however, is probably theoretical only, since the financial ability of groups to form banking undertakings is limited in an age when few individuals have really large amounts of money to invest.

> "(b) borrowing by any person, other than a local authority, where the money borrowed is repayable on demand or not more than six months after demand and the loan is wholly unsecured or is secured only by a bill of exchange payable on demand or at a fixed period not exceeding six months after the date of the borrowing or after sight or by a promissory note payable not more than six months after the date of the borrowing."

The meaning of this exemption is quite clear, and is, broadly, that no Treasury consent need be obtained for a loan in excess of £10,000 where the loan is unsecured and is repayable on demand or after six months' notice. (Note that the proviso to Article

(*a*) *Cotman* v. *Brougham* [1918] A.C. 514.

1 (2) states that "for the purposes of this paragraph a loan in respect of which a guarantee is given is not an unsecured loan.")

For the ordinary borrower, this exemption has little importance, since it is unlikely that strangers will lend money without proper security. If banks are prepared to lend money on this basis to clients, then paragraph 2 (a) would normally apply. It is possible for a banking undertaking to lend money to a person not in the ordinary course of that persons's business without security, and then this exemption could be invoked. The munificence of the ordinary bank manager, however, rarely extends this far.

Mr. F. C. Howard in his book (*b*) discusses the probable importance of this paragraph (at p. 183):

"This exemption was no doubt inserted to assist the method by which certain large groups of companies are financed internally. It has been a common practice where a number of companies are associated, or where a large public company has a number of operating subsidiaries for one of them to act, as it were, as bankers to the rest. All funds not immediately required for the business of the individual concerns are lent to the parent or a financial company in the group, who in turn loans the funds to those companies of the group who are in need of finance, and only when there is general shortage of funds in the group is recourse had to outside sources whether by way of bank loans or the issue of securities to the public. It is a convenient and economical way of financing the group."

"(c) borrowing by a local authority for the sole purpose of defraying expenditure (including the payment of sums due by them to meet the expenses of other authorities) pending the receipt of revenues receivable by them in respect of the period of account in which that expenditure is chargeable, so long as—

(i) the expenditure is not capital expenditure; and

(ii) the money is repayable not later than one month after the termination of that period of account; and

(iii) the amount outstanding at any one time does not exceed one half of the total revenues received or receivable in respect of that period of account."

The borrowing by local authorities is specialised and, since it is outside the scope of this article, will not be discussed (*c*).

"(d) acceptance by a person carrying on a banking undertaking or a member of the London Discount Houses Committee

(*b*) *Exchange and Borrowing Control.*

(*c*) For reference see, *e.g.*, *Local Authority Borrowing* published by the Institute of Municipal Treasurers and Accountants (Incorporated) (January, 1957).

of moneys to be placed to the credit of a current or deposit account, whether or not any security is given;

" (e) borrowing by the personal representative of a deceased person in his capacity as such for the purpose of paying death duties payable by reason of the death of the deceased; and

" (f) borrowing from a department of Her Majesty's Government in the United Kingdom."

The above exemptions are quite clear, and, for the purposes of this article, are not relevant.

Express Exemptions

So far as the small business man is concerned, probably his greatest interest and difficulty is in the interpretation of Part II of the 1947 Order which is headed " General Exemptions." For the small borrower, the proper interpretation of article 8 is most important, yet the provisions are most obscure. It is proposed to dwell upon this article rather fully, since there appears to be no judicial interpretation of it, and the literature on the subject is sparse (*d*).

Article 8 (1) (as amended) reads:

" Subject to the provisions of this Article, the consent of the Treasury shall not be required to the carrying out by any such person as is mentioned in any of the provisions of Part I of this Order of any transaction mentioned in that provision if the amount involved in the transaction together with the amount involved in all previous transactions by the same person in the previous twelve months, being transactions which are to be taken into account in accordance with paragraph (2) of this article, does not exceed £10,000."

The precise reason for this " exemption " appearing here is, at first sight, rather vague. The substance of this paragraph is stated in section 1 (1) (a) of the 1946 Act, and it is further set out in article 1 (1) of the 1947 Order. The fact that it should be repeated as an exemption in article 8 (1) not only seems strange, but also lends itself to the possibility of fallacious legal reasoning. Article 8 (4) states that " the Treasury may at any time direct that the exemption conferred by this Article shall not apply to any person specified in the direction." Paragraph (1) is an exemption conferred in article 8 and begins by stating " Subject to the provisions of this Article." Does this mean, therefore, that the Treasury could at any time direct that any person or persons

(*d*) But see Howard's *Exchange and Borrowing Control* (1948), and George's *The Sale of Flats* (1957), at pp. 57 to 59.

shall not have the benefit of such exemption and may, therefore, not borrow amounts of less than £10,000 in any twelve months without first obtaining Treasury consent? The effect of this would be that, were the Treasury to make such a direction, the victim would have to apply for consent to borrow even £10. The fallacy of the argument should be fairly obvious. Section 1 (1) of the 1946 Act states that the Treasury may make orders for the regulating of the borrowing of money in excess of £10,000, and so implies that no orders may be made to regulate borrowing of less than an aggregate of £10,000 in a period of twelve months. Since this is laid down by the parent Act, no order made under the authority of the Act can exceed the parent powers. Thus, any possibility of a direction against a person stating that Article 8 (1) does not apply to him would be *ultra vires* and void.

What, then, is the reason for paragraph 8 (1)? The answer lies mainly in connection with the raising of money by a body corporate by the issue of shares. Article 3 of the 1947 Order provides, broadly, that, subject to the exemptions contained in Part II of the Order, Treasury consent is required where a body corporate raises money in Great Britain by the issue of shares where the total consideration exceeds £500. Paragraph 8 (1) thus lessens the restriction of Article 3 considerably, since now consent is only required where the total consideration for the issue of shares exceeds £10,000. Under the 1947 Order, the amount of the exemption in paragraph 8 (1) was stated to be £50,000; but article 1 of the Control of Borrowing (Amendment) Order, 1956, substituted £10,000 for £50,000, and thus, so far as borrowing is concerned (apart from the issue of shares), the exemption is negatived, since the £10,000 limit is imposed in the 1946 Act.

The criticism of article 8 (1) is interesting from the jurisprudential viewpoint, but the main criticism of the article must be levelled against the obscurity of paragraph (2). The provisos to the paragraph contain the exemption or exemptions which can most be used by the small business man, yet any attempt to assert dogmatically their correct meaning would be rash. There will be very few business men who could confidently understand the provisos after reading them, and probably few legal advisers can advise on their meaning with any confidence.

Paragraph (2) begins by attempting to delimit what "previous transactions" in the previous twelve months must be taken into account for the purposes of aggregating them with the present transaction to decide whether or not the total amount borrowed exceeds £10,000. Paragraph (2) begins:

"The previous transactions to be taken into account for the purposes of this Article are—

(a) any borrowing of money in Great Britain except such borrowing as is mentioned in paragraph (2) of Article 1 of this Order, whether or not the consent of the Treasury under this Order was required thereto; and

(b) any other transaction to which the consent of the Treasury under this Order was required or would, apart from the provisions of this Part of this Order, have been required."

It will thus be appropriate to discuss here what constitutes borrowing. Article 2 of the Order extends the ordinary meaning of borrowing to include:

(a) any arrangement whereby a guarantee is provided or property is mortgaged or charged to secure the payment of any sum *which is already due* at the time the arrangement is made or is payable not later than six months after the arrangement is made, and

(b) any arrangement by which the price of any property is allowed to remain unpaid either for a fixed period or indefinitely, provided that such price is *charged on the property*, except—

(i) the price of goods sold by a person in the ordinary course of his business, and

(ii) the price of any undertaking under a sale thereof to a body corporate.

Whenever the repayment of a debt is postponed by the giving of a fresh guarantee or a mortgage of property, this constitutes a borrowing. Thus, if A owes B £10,000 payable on demand or within six months thereafter, and B then agrees to accept a guarantee or security to secure the amount outstanding, such guarantee or security would rank as "a borrowing of £10,000" for the purposes of Article 8.

Further, if the purchase price of property were left outstanding by a vendor in favour of a purchaser, such amount is usually deemed to be a borrowing by the purchaser. The example which quite often occurs on a house purchase, *i.e.*, where V sells property to P and V leaves the whole or part of the purchase price outstanding upon obtaining the security of a mortgage on the property, constitutes a "borrowing" within the Order. That is a straightforward loan. But the position may arise where P buys property from V and, in the agreement for sale, it is agreed that the whole or part of the purchase price need not be paid for a certain period and it is expressly stated that there is no charge on the property to secure the purchase price. Such an agreement would not, it

is thought, be deemed to be a borrowing by P of the amount left outstanding. (The Control of Borrowing (Amendment) Order, 1955, substituted a new sub-paragraph (a) of paragraph (1) of article 2, which new sub-paragraph does, it is submitted, justify this view.) But, if, at a later stage, either when the amount is due, or within six months of its becoming due, V obtains security (including a guarantee) for the payment of the amount, such amount then becomes a borrowing by P. However, in the case of land, a vendor who conveys without receiving the full purchase price has an equitable lien on the land for the balance unpaid, which may be enforced by application to the court (*e*). Since the lien is an implied equitable charge on the land, to leave the purchase price of property outstanding without an express charge would probably constitute a charge within article 2 (1) (b) in the case of land. To ensure that there was no borrowing within the terms of the article, the vendor would have to waive or abandon the lien. What is more, a vendor of personal property (other than the vendor of goods sold in the ordinary course of his business) may have a similar lien (*f*) and it may well be that even to leave the purchase-money outstanding on such a sale of personal property might constitute an implied charge and so a borrowing within article 2 unless the lien were expressly excluded.

An arrangement to pay for land by the issue of redeemable debenture stock and shares issued as fully paid was held not to constitute a borrowing of money within article 2 (*g*).

Having discussed the extended meaning of borrowing, we may now return to the provisos to paragraph (2) of article 8. The wording of the provisos in the 1947 Order has been amended by the Control of Borrowing (Amendment) Order, 1955. (By that Order, proviso (ii) of paragraph (2) was deleted.) The original provisos will be set out first, and then the revised provisos, with the amendments in italics:

Original Provisos

"Provided that—

(i) where the effect of any of the said previous transactions consisting of the borrowing or raising of money was that a capital liability (other than a capital liability in respect of any such borrowing as is mentioned in paragraph (2) of Article 1 of this Order) discharged contemporaneously

(*e*) *Mackreth* v. *Symmons* (1808) 15 Ves. 329.

(*f*) *Davies* v. *Thomas* [1900] 2 Ch. 462; *Re Stucley, Stucley* v. *Kekewich* [1906] 1 Ch. 67. See also Sale of Goods Act, 1893, s. 41.

(*g*) *London and Country Commercial Properties Investments, Ltd.* v. *Att.-Gen.* [1953] 1 W.L.R. 312.

with, or not more than three months before, that transaction, was replaced by another capital liability, the amount involved in that transaction shall be treated as reduced by the amount so discharged;

(ii) . . .

(iii) where any of the said previous transactions consisted solely of the borrowing of money which, subsequent to that borrowing, was repaid in whole or in part, the amount involved in that transaction shall be treated as reduced by the amount repaid unless the repayment formed part of any other of the said previous transactions and the whole or part of the amount involved in that other transaction has been left out of account by virtue of proviso (i) of this paragraph."

Provisos as amended by the 1955 Order

"Provided that—

(i) where the effect of any of the said previous transactions consisting of the borrowing or raising of money was that *any share or loan capital* (*other than loan capital raised* by any such borrowing as is mentioned in paragraph (2) of Article 1 of this Order), *which was redeemed or repaid* contemporaneously with, or not more than three months before, that transaction, was replaced by *other share or loan capital*, the amount involved in that transaction shall be treated as reduced by the amount so *redeemed or repaid*;

(ii) . . .

(iii) where any of the said previous transactions consisted solely of the *borrowing or raising of money which, subsequently to that borrowing or raising*, was repaid in whole or in part, the amount involved in that transaction shall be treated as reduced by the amount repaid unless the repayment formed part of any other of the said previous transactions and the whole or part of the amount involved in that other transaction has been left out of account by virtue of proviso (i) of this paragraph."

The only satisfactory way of attempting to interpret the meaning of these provisos is to use examples to illustrate the application of the exemptions. Although there appears to be virtually no judicial interpretation of the Control of Borrowing Orders—the only reported case on Control of Borrowing appears to be *London and Country Commercial Properties Investments, Ltd.* v. *Att.-Gen.* (*h*)—the provisions are such that they warrant explanatory

(*h*) [1953] 1 W.L.R. 312.

material issued with the Orders. Although the explanations and illustrations would not be part of the Orders, the courts would generally accept them, if they were appended to the Orders, as being of relevance and value in construing the text; and they would only be rejected as repugnant to the Orders as the last resort of construction (*i*). However, since there is no explanatory material, it is necessary to find examples which illustrate the working of the provisos.

At first sight, provisos (i) and (iii) appear to overlap, and indeed it may be difficult to see any difference between them. The substantial effect of each exemption, at first, would appear to be the same, *i.e.*, that a person may borrow up to £10,000 in any period of twelve months without consent, and for that purpose any part of the amount borrowed which is repaid during the twelve months may be re-advanced and repaid as many times as possible, provided that at no one time is more than £10,000 outstanding.

One of the few places where the provisos are discussed and illustrated is in *The Sale of Flats* by E. F. George, at pages 57 to 59. The discussion is somewhat brief, but the illustration of proviso (i) does attempt to show how that proviso differs from proviso (iii). Mr. George's example is as follows: "If a loan of, say, £20,000 was made in December, 1955, and repaid in December, 1956, a fresh borrowing in January, 1957, in excess of £10,000 would require consent. If, however, in February, 1957, the borrower wishes to borrow yet a further sum not exceeding £10,000, the amount of the loan in January, if it did not exceed £20,000, would not have been taken into account, for the effect of the January loan would have been to replace the loan discharged in December. . . . It will often be found possible to replace one loan by another without consent. Thus, if a loan of £20,000 was made in December, 1955, and repaid in December, 1956, then the borrower can borrow £10,000 without consent in January, 1957. If he borrows a further £10,000 the following day, again consent is not required, because the January loan is, under the exemption we are considering, not taken into account for the purposes of the Order."

The illustration drives home the crucial distinction between provisos (i) and (iii). In the latter proviso, the *original loan* must have been within the last twelve months, whereas in proviso (i) the original loan need not have been within the last twelve months, the important factor from the time viewpoint being the *date of repayment* of the loan. In other words, proviso (i) provides that

(*i*) *Mahomed Syedol Ariffin* v. *Yeok Ooi Gark* [1916] 2 A.C. 575.

if at any time within three months of the repayment of a loan, two further loans are obtained, the second further loan need not take into account the amount of the first loan for Treasury consent purposes, if the first of the further loans "replaces" the amount previously repaid and does not exceed that figure. However, if the first further loan exceeds £10,000, Treasury consent would apparently still be required notwithstanding that Treasury consent had already once been obtained for the original loan which has been repaid and to which the first further loan is deemed a replacement.

A further analysis of the position, based upon Mr. George's examples, should clarify the strange position. (For simplification it will be assumed that in December, 1955, Treasury consent was necessary to borrow in excess of £10,000, although at that time the correct figure was £50,000.)

Examples under Proviso (i)

Example 1. (Where Treasury consent is initially required.)

(a) December, 1955.	Loan of £20,000.	(As the borrower is in excess of £10,000, Treasury consent is required.)
(b) December 31, 1956.	Loan of £20,000 is repaid.	
(c) January 1, 1957.	New loan of £20,000.	(Here Treasury consent is required. Proviso (iii) cannot be invoked by claiming that the £20,000 is a substitution for the original loan and, therefore, no consent is necessary, since the previous transaction, *viz.*, the first loan of £20,000 did not occur *within* 12 months of the present borrowing. Proviso (i) cannot be invoked, since the wording of the proviso appears to prevent its applying to the first new loan after the repayment.)
(d) February 1, 1957.	Further loan of £10,000.	(Here Treasury consent will not be required, since the only previous transaction within the past 12 months, *i.e.*, the loan on January 1, 1957, will be treated as a replacement of the loan of December, 1955, which was repaid in December, 1956.)

Example 2. (Where Treasury consent is initially required.)

(a) December, 1955.	Loan of £20,000.	(Treasury consent required.)
(b) December 31, 1956.	Loan of £20,000 is repaid.	
(c) January 1, 1957.	New loan of £10,000.	(Here Treasury consent is not required, since this has been the only borrowing within the past 12 months, and it does not exceed £10,000.)
(d) February 1, 1957.	Further loan of £10,000.	(Again Treasury consent is not required, since the present loan does not exceed £10,000, and the only previous loan within the past 12 months, *i.e.*, in January, 1957, is, by virtue of proviso (i), a "replacement" of the loan of December, 1955.)
(e) March 1, 1957.	Further loan of £10,000.	(Treasury consent is still not required. The only previous transactions, *i.e.*, on January 1 and February 1, 1957, are treated as replacements of the 1955 loan, since the two new loans do not exceed the 1955 loan, and the present borrowing is within 3 months of the repayment of the 1955 loan. Of course, any further loans, even within 3 months of the repayment on December 31, 1956, must count as a loan and be aggregated with the present loan and so make necessary Treasury consent (unless prior loans were previously repaid) since the loans of January 1 and February 1, 1957, totalling £20,000, will exhaust the 1955 loan of £20,000.)

It will be noted from the extract from *The Sale of Flats* that Mr. George is prepared to accept that no consent would be necessary even were the loans of (c) and (d) above made one day after the other, *e.g.*, if (d) took place on January 2, 1957. It would also follow from this reasoning, that if the loan in (e) above were to take place on January 3, Treasury consent would still not be required. Thus, in the space of three days, £30,000 can be borrowed without applying to the Treasury for consent. It is thought that this reasoning is sound. There is, of course, the possibility of the Treasury

raising the stamp duty argument of "all one transaction" if the borrowings were all from the same person. The Treasury might claim that the three borrowings in reality represent one transaction, *i.e.*, a loan of £30,000 and so consent is necessary (*k*). It is submitted that such an argument would not be accepted in this branch of the law, and the "all one transaction" doctrine would be confined to the law of stamp duties.

Example 3. (Where Treasury consent is not initially required.)

(a) December, 1955.	Loan of £10,000.	
(b) December 31, 1956.	Loan of £10,000 is repaid.	
(c) January 1, 1957.	New loan of £10,000.	(Treasury consent is not required, since there has been no other borrowing within the past 12 months.)
(d) February 1, 1957.	Further loan of £10,000.	(Proviso (i) comes into operation, and no Treasury consent is required, since the loan of January 1, 1957, is treated as replacing the loan of December, 1955.)
(e) March 1, 1957.	Further loan of £10,000.	(Here Treasury consent will be required, since the loan of December, 1955, has been exhausted by the loan of January 1, 1957, and so the loans of February 1 and March 1 are counted as loans within a period of 12 months.)

It can now be seen that proviso (i), although strange in its operation, can be very useful, and also covers very different ground from that of proviso (iii). To finish the discussion of this proviso, it might be useful to assess how the amendment in the 1955 Order changes the effect and meaning of the proviso as set out in the 1947 Order. (It is reasonable to assume that if any legislation has been amended or rephrased, it is due to a change in meaning, or at least to an effort to clarify an ambiguity.) The material change is the substitution of "share or loan capital" in place of "capital liability." How this affects the meaning is obscure. It can be argued that whereas the original proviso (i) could be used by all legal persons, the effect of the revised proviso applies only to transactions where companies are concerned, since "share or loan capital" does not seem an appropriate term for an individual. It is thought, however, that in the absence of a more

(*k*) *Cf. Cohen and Moore* v. *Inland Revenue Commissioners* [1933] 2 K.B. 126.

specific statement that the proviso only applies where companies are concerned, all legal persons can make use of the proviso. Thus, probably there is no material change in meaning between the original and revised proviso.

Progressing to proviso (iii), one can more readily appreciate its meaning and effect on a first reading: a legal person may borrow up to £10,000 in any period of twelve months without consent, and for that purpose any part of the amount borrowed which is repaid within the twelve months may be re-advanced and repaid as many times as desired, provided that at no one time is more than £10,000 outstanding. Further, even if Treasury consent has been obtained to borrow a specific amount in excess of £10,000, much more than £10,000 may be borrowed without further consent provided that at no one time is more than the permissible amount outstanding. (See article 8 (2) (a) of the 1947 Order.)

Once more, the effect of the proviso may best be shown by examples:

Examples under Proviso (iii)

Example 1. (Where Treasury consent is initially required.)

Date	*Amount of loan*	*Amount Repaid*	*Amount Outstanding*	
December, 1955.	£20,000	——	£20,000	
January, 1956.	——	£5,000	£15,000	
February, 1956.	£3,000	——	£18,000	
March, 1956.	——	£9,000	£9,000	
April, 1956.	£11,000	——	£20,000	(It will be noted that although the amount is increased from £9,000 to £20,000, Treasury consent is still not required, because consent was originally given for the borrowing of £20,000.)
May, 1956.	——	£5,000	£15,000	
June, 1956.	£5,000	——	£20,000	
September, 1956.	——	£10,000	£10,000	
November, 1956.	£10,000	——	£20,000	(Note: if the advance had been £11,000, the total amount outstanding would be £21,000 and so fresh consent would be required.)

Total amount borrowed in period of 11 months.	£49,000
Largest amount outstanding at any one time.	£20,000

Example 2. (Where Treasury consent is not initially required.)

Date	*Amount of loan*	*Amount Repaid*	*Amount Outstanding*	
December, 1955.	£10,000	——	£10,000	
February, 1956.	——	£5,000	£5,000	
March, 1956.	£5,000	——	£10,000	
April, 1956.	——	£9,000	£1,000	
May, 1956.	£8,000	——	£9,000	
July, 1956.	——	£3,000	£6,000	
August, 1956.	£4,000	——	£10,000	
September, 1956.	——	£8,000	£2,000	
November, 1956	£8,000	——	£10,000	(Note: if the advance had been £9,000, the total amount outstanding would be £11,000, and so Treasury consent would be required.)

Total amount borrowed in period of 11 months.	£35,000	
Largest amount outstanding at any one time.	£10,000	No Treasury consent required.

The idea of periodic borrowings and repayments is not purely theoretical merely to illustrate that large amounts can be borrowed in a period of twelve months without requiring consent. For example, many estate developers require comparatively small loans to develop parts of an estate which loans they are able to repay when the completed parts of the estate are sold, and then fresh loans are required to develop the estate further, and also perhaps to develop new estates.

While discussing the effect of proviso (iii) it is relevant to discuss the meaning of the term " to be borrowed " in the Order. Does this mean the amount borrowed at any one particular time, or does it mean the amount " agreed to be borrowed " in all?

Often, in building advances, a mortgage deed provides for the payment of the advances in stages dependent upon the progress of the development, but the mortgage deed is expressed to be for the overall amount to be borrowed. Thus, an initial advance of less than £10,000 may be made on the security of a deed expressed to be and stamped for an amount in excess of £10,000. It is possible to invoke the exemption of proviso (iii) throughout the development, and so Treasury consent should not be necessary, provided, however, that "to be borrowed" does not mean the total amount inserted in the mortgage deed. Article 8 (5) (a) defines "the amount involved" in relation to the borrowing of money as the amount of money to be borrowed. However, it is submitted that for this purpose a borrowing takes place when money is advanced, and not when an agreement is entered into. Thus, if a mortgage agreement is entered into for the loan of, say, £20,000, but the initial advance is £5,000, a certificate can safely be given to the Inland Revenue for stamping purposes that the 1947 Order is being complied with. Treasury consent need not be applied for until more than £10,000 is actually borrowed and outstanding at one time. If proviso (iii) can operate, Treasury consent may not even then be required.

The two provisos (i) and (iii), although obscure, are to the small business man important exceptions to the rigid control of borrowing regulations.

General Considerations and Joint Borrowing

Having examined the major points of the Control of Borrowing Order, from the small business man's viewpoint, it is now proposed to examine some further difficulties which may arise when a small firm attempts to borrow money.

A typical and very common example of persons urgently concerned with borrowing control is the case of a firm of small builders and estate developers comprising two or three individuals. Two members of the firm purchase a piece of land as tenants in common for the purpose of developing maisonettes. Can the two legal estate owners borrow up to £10,000 or up to £20,000 on the security of the land without consent? It is submitted that since any individual may borrow up to £10,000, each legal estate owner may borrow £10,000 provided that he is an equitable tenant in common. If this is so, it follows that if four partners purchase a piece of land for maisonette development then up to £40,000 may be borrowed without consent. There is no clear reference to "partners" in the 1947 Order, and each estate owner is a legal personality

with full power to use his rights to borrow up to £10,000. The Treasury Capital Issues Committee, however, without referring to any authority, have laconically stated that " when a person borrows jointly with another person the aggregate amount of the borrowing must be taken into account as if each person has borrowed the full amount separately." The Committee then state that " it is for the borrowers or their legal advisers to decide whether joint owners of a property are borrowers severally or jointly on the security of that property."

If the Treasury interpretation is correct, then the result can be fantastic. Two joint tenants may effect one borrowing on the security of their joint property and they are limited to £10,000, notwithstanding that they may be equitable tenants in common of the property in equal shares. But there would appear to be no objection to each equitable tenant in common borrowing up to £10,000 on his equitable interest only, save that it is extremely unlikely that any lender would be prepared to lend money to joint tenants on the security of their equitable interests, and once the co-tenant joins in, it may well be that a joint borrowing arises. Further, if the joint owners of land are limited to £10,000 in all, what would be the position if A and B jointly purchased land for development and A had already borrowed £10,000 in the past twelve months in circumstances where no exemptions applied to him? The result would seem to be that no further borrowing can be effected on the security of the legal estate in the land without consent, notwithstanding that B has an interest in the land and has borrowed no money within the past twelve months.

To overcome the difficulty of joint borrowing, four legal estate owners of a piece of land can split the land and the legal estate into four titles and each borrow £10,000 and develop one-quarter of the land. The only inconvenience would be caused to the legal advisers, who might have to complicate the conveyances or long leases to the purchasers of maisonettes by inserting numerous cross rights over common property. If it is not possible to find four persons to own a piece of land each, then there is nothing simpler than forming a number of companies to effect this purpose.

Indeed, companies can be used by the small business man to overcome many of the difficulties of borrowing control. A new company or companies can be formed to acquire different pieces of land for different development, and each company can borrow up to £10,000. Another very important point which should not be overlooked is that a company may be formed with a capital of £10,000 paid up in cash by the subscribers (Control of Borrowing Order, 1947, article 3 (2), as affected by article 8 (1), as amended)

and the company may then, the very next day, borrow a further £10,000 without Treasury consent. £10,000 may be acquired without consent by the formation of the company, and then the new legal entity may exercise its right to borrow up to £10,000 without consent (Control of Borrowing Order, 1947, article 1 (1)). The openings for using companies to evade the Treasury control net are many. However, there are several lending concerns who, for various reasons, refuse to lend money to companies on the security of land. Therefore, the position of individuals will be further considered.

It is submitted that, in spite of the view maintained by the Capital Issues Committee, a common-sense appraisal of any joint borrowing should always be made. It is suggested that since there is no reference to " partners " or other groups of individuals holding land jointly, the courts would follow the judicial attitude towards the interpretation of penal and taxing statutes, and construe the provisions of the Borrowing Orders strictly and against the Crown rather than liberally according to the spirit of the Orders. (" . . . if on construing the relevant sections of the Act and the Order there appears any reasonable doubt or ambiguity, then being a penal statute I must apply the principles laid down succinctly by Lord Esher in *Tuck & Sons* v. *Priester* (1887) 19 Q.B.D. 629. . . . ' If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections ' ": *per* Upjohn J. in *London and Country Commercial Properties Investments, Ltd.* v. *Att.-Gen.* (*l*). " The question is not at what transaction the section is, according to some alleged general purpose, aimed but what transaction its language, according to its natural meaning, fairly and squarely hits " (*ll*).) If joint owners hold land upon trust for themselves as tenants in common, each owner who has an equitable interest should be able to borrow £10,000 without consent. If A and B are joint owners of land upon trust for themselves as tenants in common in equal shares and they propose to develop the land, an advance of £20,000 could safely be made to them on the security of the whole of the land. All that would be necessary would be for A and B, as mortgagors, to recite in the mortgage deed, or in a separate document, that for the purposes of borrowing control the loan is to be £10,000 on each of A's and B's equitable shares in the land. It could be argued, however, that since A and B

(*l*) [1953] 1 W.L.R. 312, 319.
(*ll*) *Cf. St. Aubyn* v. *Att.-Gen.* [1952] A.C. 15, 32, *per* Lord Simonds.

would normally each be required to enter into joint and several covenants with the lenders, they would each be liable for the £20,000, and so the borrowing would truly be joint borrowing. It is suggested that this argument is unsound by reason of the express or implied indemnity of both A and B against each other for the £10,000 borrowed by each (*cf.* the position of guarantors). Also, the problem posed above where A and B buy land jointly and A has already borrowed £10,000 can now be overcome. A and B could charge the land to the lenders to secure £10,000, and the charge can recite that for the purposes of borrowing control B is taking the loan on his equitable interest in the property. The fact that the loan may then be used for the benefit of A and B should be irrelevant.

Complications may arise, however, when legal estate owners of land are trustees for third parties. Is there anything in the Control of Borrowing Orders to prevent a trustee of property from borrowing £10,000 on the security of the property, when the beneficial owner of the property has already borrowed £10,000 in the previous twelve months? The answer surely is that the trustee can do as he wishes with his personal right to borrow up to £10,000 without consent. If he subsequently desires to borrow £10,000 for his own purposes, he must obtain Treasury consent, since he has used his own allowance for the benefit of the beneficial owner of the land.

It would also be impossible for X, the beneficial owner of the land, to appoint four nominees, A, B, C and D, as trustees of the land for him, for the purpose of enabling them each to borrow £10,000 on the security of the land. On the argument previously advanced, since none of the trustees has an equitable beneficial interest in the property, the borrowing is, without doubt, joint, and only £10,000 may be advanced to the four trustees. Again, the fact that X may himself already have borrowed £10,000 would be immaterial. As stated, the position can be exploited by two individuals, A and B, forming several private companies, the directors of each of which are A and B, and each company borrowing £10,000 for the benefit of A and B.

Conclusion

The legal adviser may perhaps now advise the small business man more clearly on the way in which the Control of Borrowing Orders affect him. The principal regulation that there must be no aggregate borrowing of over £10,000 in any one year, without consent, is modified if such borrowing comes within the general exemptions set out in article 1 (2) of the 1947 Order or the provisos

to article 8 (2). There is great scope for avoiding the stringent limit of £10,000, but, in the virtual absence of judicial interpretation, the application of the obscure legislation will often be doubtful. The Schedule to the Borrowing (Control and Guarantees) Act, 1946, deals with the severe penalties involved in contravening any Order under the Act. (Upjohn J. in *London and Country Commercial Properties Investments, Ltd.* v. *Att.-Gen.* (*m*), states that the Act "represents the high-water mark of the Parliamentary invasion of the traditional rights of the subjects of this realm. Not only does it impose upon offenders substantial penalties—no objection could be taken to that—but what is so serious from the point of view of the subject is, that where a body corporate has been found to be an offender, then every director, general manager, secretary or other similar officer of the body corporate, including a person who was purporting to act in those capacities, is deemed to be guilty unless he proves that the offence was committed without his consent or connivance, thereby reversing the usual and traditional rule of English law that a man is innocent until he is proved guilty.") In spite of the sobering thought of the penalties it is as well to conclude by citing the comforting remarks of Mr. F. C. Howard in *Exchange and Borrowing Control* concerning the provisos to article 8 (2) of the 1947 Order: "These provisos are so obscure that it seems difficult to believe that any court would impose any serious penalty in case of a contravention of the Order which appeared as if it might be covered by any of the provisos but which on interpretation by the court was not." One must deplore the fact that such risks can exist, but can only hope that these sentiments would be applied to the whole of the Order.

(*m*) [1953] 1 W.L.R. 312, at p. 318.

CLEAN AIR LEGISLATION AND THE PROPERTY-OWNER

By J. F. Garner, ll.m., Solicitor

Some of the sections of the Clean Air Act, 1956, came into force on December 31, 1956 (*a*); the remainder of the Act came into operation on June 1, 1958 (*b*). It is, therefore, now opportune to consider the effect that the Act will have on property-owners and their advisers, conveyancers in particular. The Act can most easily be considered under four headings, smoke control areas, which impose a new type of control over the use of property; the height of chimneys, provisions relating to which extend building by-law control; the control of furnaces; and the abatement of smoke nuisances. The control of the emission of smoke from railway engines and vessels we consider to be outside our scope, as are the administrative provisions of the Act.

1. Smoke Control Areas (1956 Act, ss. 11–15)

Section 11 (1) empowers any local authority (*i.e.*, a county borough or county district council, or a combination of such councils) to declare the whole or any part of their district to be a smoke control area. The consequences of such an order, assuming that it is duly confirmed by the Minister (of Housing and Local Government), either with or without modifications, are important, and are described below; the conveyancer will first need to know whether such an order has been made affecting the property with which he is dealing, and the landowner will be concerned to ensure that he is made aware of the making of such an order. Orders are not specifically made registrable as local land charges, although it is submitted that an order affecting part only (*c*) of a local authority's area is so registrable, as it imposes restrictions on the use of land within the specified area, as explained below. However, it is doubtful whether the failure to register such a local land charge would impair its validity, and therefore a question has been included (in Part I (*d*)) in the standard inquiries customarily

(*a*) S.I. 1956, No. 2022.
(*b*) S.I. 1958, No. 167.
(*c*) If the whole of the authority's district is affected, the order would not be registrable, by virtue of s. 15 (7) (b) (i) of the Land Charges Act, 1925 (as amended).
(*d*) Those questions that are asked—and answered—for the "omnibus" fee of 10s.

addressed to the local authority at the time when a search is made in the local land charges register, which inquires simply whether a smoke control area order has been made, and when it came into operation.

The landowner—of premises within the proposed smoke control area—will not be personally advised of the authority's intention to make an order, but a great deal of advance publicity will almost certainly be undertaken, and notices have to be published in the *London Gazette* and local newspapers (*e*).

The procedure is not expected to be implemented rapidly; an order when confirmed will not come into operation in less than six months and there will normally (*f*) be a Ministerial inquiry before any order is confirmed. Moreover, the local authority have to carry out extensive survey work before their order is made; these are some of the sections that were brought into force at the beginning of 1957, and to date only six local authorities (*g*) are reported to have made orders. Smoke control areas will for some time to come normally exclude predominantly industrial areas; local authorities will concentrate on the residential areas and areas of mixed development, including probably the town centres. In some cases a comparatively large area may be defined, in which certain buildings only may be made subject to control, or in which certain buildings may be exempted from control.

When a smoke control area order has come into operation, it becomes an offence for smoke (*h*) to be emitted from a chimney of any building (*i*), unless it can be proved that the fuel used was an "authorised fuel" (*k*); the order may also provide for particular buildings to be exempt from the order. Subject thereto, however, the prohibition is total; the local authority do not have to show that the particular emission caused a nuisance, or that the emission was particularly obnoxious, or that the smoke emitted was "dark smoke" (*l*), or "black smoke" (*m*).

The powers of the local authority in a smoke control area are not, however, confined to taking legal proceedings. By section 12—

(*e*) 1956 Act, First Schedule.

(*f*) Assuming that there are objections.

(*g*) Bolton, Denton, Hayes and Harlington, Ossett, West Bromwich and Liverpool; see [1958] J.P.L. 2.

(*h*) Defined to include "soot, ash, grit and gritty particles emitted in smoke": s. 34 (1).

(*i*) The occupier is criminally responsible: s. 11 (2).

(*k*) See S.I. 1956, No. 2023.

(*l*) See below.

(*m*) Formerly, the emission of "black smoke" was in some areas prohibited by by-laws made under s. 104 of the Public Health Act, 1936.

(a) if the owner, occupier or other "person interested" (*n*) in a private dwelling within the area incurs expenditure on carrying out adaptations—altering fireplaces, installing new appliances, etc. (*o*)—the local authority *must* repay to him $^{7}/_{10}$ ths of that expenditure, and *may* repay to him the whole or part of the remaining $^{3}/_{10}$ ths, *provided*

(i) the work is carried out before the order comes into operation, with the approval of the local authority, *and*

(ii) the work is carried out to the local authority's satisfaction (*p*);

(b) the local authority may by notice (to which the procedure of the Public Health Act, 1936, will apply (*q*)) require the owner or occupier of a private dwelling to carry out such adaptations as aforesaid; if he complies, grants under para. (a) above will be payable, but if not the local authority will be empowered to carry out the work themselves in default, recovering $^{3}/_{10}$ ths (only) of their expenses thereby reasonably incurred (*r*).

These paragraphs apply only to "private dwellings," an expression which includes a flat (see s. 34 (4)), but in addition the local authority are given, by section 15, a discretion to make grants towards similar expenditure on adaptations incurred by the owner or occupier of religious or charitable premises, or premises occupied for the purposes of an organisation concerned with "education or social welfare" (*s*).

These powers of the local authority are, therefore, of considerable importance to landowners, particularly to those who are landlords of small tenanted houses of the type which the local authority may be expected to deal with once a smoke control area has been declared (*t*). There is a provision in the Act enabling a tenant to carry out adaptations (whether or not in response to a notice from the local authority) in circumstances where the landlord's consent would be necessary under a tenancy and that consent is not

(*n*) This vague expression is not defined in the Act.

(*o*) Provided such adaptations are necessary to avoid the emission of smoke in contravention of s. 11 (2).

(*p*) See s. 12 (1).

(*q*) Part XII thereof, in particular s. 290.

(*r*) See s. 12 (2).

(*s*) As the section is discretionary, it is not likely to be the subject of litigation, but the classes of organisations that may be benefited are reminiscent of the bodies entitled to relief under s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955.

(*t*) According to the "Beaver Report" that led to the passing of the Act, over half of our atmospheric pollution is caused by the emission of smoke from private dwellings.

forthcoming, for section 28 gives the county court jurisdiction to make such order as " may appear to be just " in such circumstances. Further, if the tenant (or the landlord) considers that the wrong party has been served with a notice under section 13 (2), he may appeal to the local magistrates (*u*).

2. The Height of Chimneys (s. 10)

Section 10 of the 1956 Act extends the scope of existing building by-laws, by following the precedent set by several sections of the Public Health Act, 1936 (*v*), and requires the local authority to reject plans submitted under the by-laws for the erection or extension of certain buildings, unless they are satisfied that any chimney proposed to be erected for carrying " smoke, grit, dust or gases " (*w*) from the building will be of sufficient height to prevent the smoke, etc., from becoming prejudicial to health or a nuisance. The section does not apply to London, and it is not concerned with residences, shops or offices (*x*). In practice this provision should not cause any difficulty to conveyancers; provided the plan has been passed under the by-laws, the provisions of the section are met. It should be noted, however, that the fact that plans have been passed under the section will not necessarily be a defence to proceedings taken subsequently by the local authority for smoke emission from such a chimney, although such fact should be treated as some mitigation of the offence. This section, as is the case with the other sections of the Act discussed below, is not confined in its operation to smoke control areas.

3. Furnaces (ss. 3–7)

Section 3 has as its object the requirement that new furnaces installed in a new or existing building shall be so far as practicable smokeless. If this requirement is not met, there is an offence against the section; further, before a furnace is installed notice of the proposal to instal it must be given to the local authority. In addition, the building owner may—but need not—take the precaution of submitting plans and specifications to the local authority for their approval; if that approval is obtained, and the furnace is installed in accordance with the plans and specifications, the furnace is to be deemed to comply with the provisions of the section. This section is not specifically made enforceable against

(*u*) Public Health Act, 1936, s. 290 (3) (e).
(*v*) *e.g.*, s. 25.
(*w*) It is noteworthy that this is the only section that purports to control the emission of something more than " smoke "; all " gases " are within this section.
(*x*) Only, however, if the premises are wholly used for such purposes.

the owner or the occupier of the premises where the furnace is installed; the "person on whose instructions it is installed" is responsible. In addition, by section 6, any furnace installed after June 1, 1958, must be provided with "plant for arresting grit and dust," which has been approved by the local authority or installed in accordance with plans approved by them. In this case, the occupier is made responsible, so in neither of these sections is the landlord concerned, unless proceedings are taken by the occupier under section 28.

Further, by section 5, the occupier of any building must use any practicable means there may be for minimising the emission of grit and dust from any furnace chimney, where the furnace is not designed (*y*) solely or mainly for domestic purposes (*z*), but where it is used to burn solid fuel or solid waste. This section applies to all such furnaces, whenever they were installed.

4. Smoke Nuisances and the Emission of Dark Smoke (ss. 16, 1 and 2)

Section 1 prohibits the emission of "dark smoke" (*a*) from any chimney, subject to a number of defences. These defences are extremely technical, but the more important may be summarised as amounting to proof that all practicable steps have been taken to prevent the emission, or that the emission did not exceed ten minutes in the aggregate in any period of eight hours (*aa*), or that the emission was due to unsuitable fuel when suitable fuel was not available, or (for a period of seven years from July 5, 1956) that the emission was due to the nature of the building or equipment therein, and it had not been practicable to effect alterations thereto (see s. 2) (*b*).

Section 16 is reminiscent of the "smoke nuisance" provisions of the Public Health Act, 1936, in that it defines with some precision a new form of statutory nuisance which can be dealt with as such under sections 92 *et seq.* of the 1936 Act. Here it must be shown that smoke, other than that emitted from a chimney of a private dwelling, and not being *dark* smoke emitted from practically any

(*y*) However the furnace is in fact used.

(*z*) Unless it has a heating capacity of 50,000 B.Th.U. or more per hour.

(*a*) This is defined by reference to a shade on a device known as the "Ringelmann Chart" (see s. 34 (2)). The Minister may add to this definition by regulations, and it is to be hoped that he will soon do so as the present means of defining a criminal offence is open to obvious legal objections.

(*aa*) Dark Smoke (Permitted Periods) Regulations, 1958, S.I. 1958, No. 498.

(*b*) There is also a procedure whereby "any person interested" in a building may obtain a certificate from the local authority to the effect that it has not been practicable to alter or equip the building so as to enable it to be used without emitting dark smoke. While such a certificate is in force, there will be a complete defence to proceedings under s. 1.

other chimney (*c*), is a "nuisance" to the inhabitants of the neighbourhood; in deciding whether this has occurred in a particular case, presumably the ordinary principles of the common law as to the nature of a nuisance must be applied. Perhaps in some localities, it would be difficult to allege that the smoke emitted from just one of many chimneys was a nuisance, whereas in a country area the emission of the same quantity of smoke would certainly amount to a nuisance (*d*).

Under section 1, liability is expressly placed by the section on the occupier of the building; in the case of proceedings for a statutory nuisance (and the abatement procedure is specially abbreviated by s. 16 (2)), the local authority must proceed against the person "by whose act, default or sufferance the nuisance arises or continues." This would normally seem to be the occupier as he will (presumably) be the person responsible for lighting the fire which causes the smoke, but if it can be shown that the nuisance arises from a defect of a structural character (as may well be the case where the chimney is not high enough, or the flue is not properly constructed, etc., and it is not simply a question of the use of unsuitable fuel or improper stoking), proceedings under the 1936 Act itself should be taken against the *owner* (*e*).

5. Responsibilities of Owners

In this matter of the abatement of air pollution, then, the owner of premises will be concerned in the following circumstances:

(a) In the case of a private dwelling within a smoke control area, with the adaptation of fireplaces where necessary. If he is not also the occupier, he will not necessarily be directly concerned unless the occupier brings him in under section 28; on the other hand, as a "person interested" in the dwelling, he may carry out the adaptations himself, and in that event he should ensure that the local authority's grant will be payable (*f*).

(b) In the case of charitable or religious premises within a smoke control area, the owner (if he incurs the expenditure) may

(*c*) But smoke emitted from a pile of refuse is *not* excluded from s. 16. Colliery spoilbanks are dealt with under s. 18 of the Act.

(*d*) "What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey": *per* Thesiger L.J. in *Sturges* v. *Bridgeman* (1879) 11 Ch.D. 865.

(*e*) Public Health Act, 1936, s. 93, and see proviso (a) thereto. If the shortened procedure of s. 16 (2) of the 1956 Act is used, and proceedings for abatement only are taken (as distinct from proceedings for abatement and a fine under the 1936 Act), the question of structural defects does not apparently arise.

(*f*) While adaptations are being carried out, consideration might well be given to carrying out more extensive improvements, possibly qualifying for an improvement grant under Part II of the Housing Act, 1949.

be able to get a discretionary grant from the local authority towards the cost of making adaptations.

(c) The owner who is not also the occupier is not concerned with sections 1, 3, 5, 6 and 10, but, as mentioned above, he may be liable in the event of a smoke nuisance.

(d) If his premises are to be used for a "scheduled work" (*g*) under the Alkali, etc., Works Regulation Act, 1906, he will be concerned to ensure that the "work" is duly registered under the Act with the Alkali Inspectorate of the Ministry of Housing and Local Government. This registration is by no means a formality; extensive precautions have to be taken to minimise the emission of "noxious or offensive gases."

6. LONDON

The administrative County of London, including the City, is subject to the 1956 Act as is the rest of the country, except that a few minor modifications are applied by section 32 (*h*). In addition, the City of London (Various Powers) Act, 1954 (*i*), gives the common council of the City certain special powers of prohibiting the emission of smoke in the City, which are not repealed by the 1956 Act and which subsist side by side with that Act. The City Act virtually makes the City a smoke control area without applying the 1956 Act machinery; there are no compulsory grants towards the cost of making adaptations under the City Act, but the common council may, as a matter of discretion, contribute the whole or part of the expense necessarily incurred in connection with the execution of works for the purpose of complying with the Act (s. 4 (4)).

The City Act, or any other local Act, may be repealed or amended by an order of the Minister of Housing and Local Government, made, after consultation with any local authority concerned, under section 35 (4) of the 1956 Act, where the local Act appears to him to be unnecessary (*k*).

(*g*) See 1906 Act, Schedule, as extended by S.R. & O. 1928, No. 26, S.R. & O. 1935, No. 162, S.R. & O. 1939, No. 1299 and S.I. 1950, No. 364; it is understood that the Minister proposes shortly to extend the list of scheduled works still further.

(*h*) Which mostly amount to the substitution in the 1956 Act of references to the Public Health (London) Act, 1936, for references to the Public Health Act, 1936.

(*i*) 2 & 3 Eliz. 2, c. xxvii; the substantive s. 4 was noted at (1954) 18 Conv.(N.S.) 521.

(*k*) The consent of the local authority is necessary if the local Act is to be repealed solely on the ground that it overlaps ss. 11 and 12 of the 1956 Act. Any such order will *not* be subject to annulment in Parliament: s. 33 (1).

7. The Crown, etc.

Crown premises—and this includes a hospital vested in the Minister of Health under the National Health Service Act, 1946 (*l*) —are not subject to the substantive provisions of the Act, but there is an administrative provision whereby the attention of the appropriate Minister may be drawn to any case of pollution caused by emissions of smoke, etc., from Crown premises (*m*). Railway engines and vessels on rivers *inter fauces terrae* are the subject of further special provisions (*n*).

(*l*) *Nottingham Hospital Management Committee* v. *Owen* [1957] 3 W.L.R. 707.
(*m*) s. 22.
(*n*) ss. 19 and 20.

STAMP DUTIES ON CONVEYANCES

By J. G. Monroe, Barrister-at-Law

1. Clause 28 of the Finance Bill embodies the proposals of the Chancellor of the Exchequer for the reduction of *ad valorem* stamp duty on the conveyance of property (other than stock and marketable securities). But it does more than this in that it consolidates in one clause what is at present scattered over the Stamp Act, 1891, and five or six subsequent Finance Acts.

2. The table appended to this note sets out the proposed rates of duty in some detail. It is to be noted that the rates apply directly to conveyances on sale and under sub-clause (3) they extend to any duty chargeable by reference to the heading "Conveyance on sale." This means that it extends to consideration for a lease other than rent (*i.e.*, premiums on leases), to voluntary dispositions and to equality money on exchange or partition.

3. The changes of substance are two:

(1) First, the reduced rates payable on conveyances of relatively small properties have been extended, in particular by eliminating *ad valorem* duty altogether where the consideration is less than £3,500. For comparison the points at which the changes are made are shown below:

Approximate Rate of Duty	*At Present*	*As Proposed*
Complete exemption from *ad valorem* duty	None	Instrument certified at £3,500
5s. per £50 ...	Instrument certified at £3,500	Instrument certified at £4,500
10s. per £50 ...	Instrument certified at £4,250	Instrument certified at £5,250
15s. per £50 ...	Instrument certified at £5,000	Instrument certified at £6,000
£1 per £50 ...	In any other case	

(2) Secondly, the above reduced rates are to be applicable to premiums on leases where the rent does not exceed £50 as compared with the present limit of £20.

The changes are to come into force on August 1, 1958 (sub-clause (8)).

4. For an instrument to be certified at a figure, the consideration (on a sale) must not exceed the figure and the instrument must contain (under sub-clause (4)) a certificate that the transaction thereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds that figure. Like its predecessor the clause contains provisions authorising one to ignore contemporaneous sales of goods on giving the certificate. But unlike its predecessor it does not contain any express provision as to the modifications in the form of the certificate for dealing with premiums on leases or voluntary dispositions.

5. The clause does not exempt conveyances or transfers assessed at nil from all stamp duties but it appears that a deed of conveyance will not attract the duty of 10s. as a "Deed . . . not described in this Schedule," though there is no express exemption from duty like that in para. 17 of the Eighth Schedule to the Finance Act, 1949. In any case it will still be necessary to produce all conveyances on sale and leases for seven years or over to the Commissioners so as to have a "Produced" stamp impressed on it under section 28 of the Finance Act, 1931, and an adjudication stamp will still be necessary on all voluntary dispositions under section 74 (2) of the Finance (1909–10) Act, 1910.

6. The privileged position of charities is preserved by sub-clause (6) which provides that with a conveyance, transfer or letting to a charity the duty is not in any case to exceed (in effect) half the rate payable where there is no certificate (*i.e.*, half of the rates shown in column 5 of the Table overleaf), an adjudication stamp being necessary where this ground for relief is relied on.

TABLE OF PROPOSED DUTIES ON CONVEYANCES ON SALE OR BY WAY OF VOLUNTARY DISPOSITION

Amount or value of consideration (or of property transferred in voluntary disposition) not exceeding	Of any property except stock or marketable securities where the amount or value of the consideration (or of the property transferred in voluntary disposition) does not exceed £3,500 and a certificate for £3,500 (see note 4) is given	Of any property except stock or marketable securities where the amount or value of the consideration (or of the property transferred in voluntary disposition) does not exceed £4,500 and a certificate for £4,500 (see note 4) is given	Of any property except stock or marketable securities where the amount or value of the consideration (or of the property transferred in voluntary disposition) does not exceed £5,250 and a certificate for £5,250 (see note 4) is given	Of any property except stock or marketable securities where the amount or value of the consideration (or of the property transferred in voluntary disposition) does not exceed £6,000 and a certificate for £6,000 (see note 4) is given	In any other case (including all transfers of stock for marketable securities except certain Canadian and Colonial Stock)
£		£ s. d.	£ s. d.	£ s. d.	£ s. d.
5		6	1 0	1 6	2 0
10		1 0	2 0	3 0	4 0
15		1 6	3 0	4 6	6 0
20		2 0	4 0	6 0	8 0
25		2 6	5 0	7 6	10 0
50		5 0	10 0	15 0	1 0 0
75		7 6	15 0	1 2 6	1 10 0
100	No *ad valorem* duty; but see note 5	10 0	1 0 0	1 10 0	2 0 0
125		12 6	1 5 0	1 17 6	2 10 0
150		15 0	1 10 0	2 5 0	3 0 0
175		17 6	1 15 0	2 12 6	3 10 0
200		1 0 0	2 0 0	3 0 0	4 0 0
225		1 2 6	2 5 0	3 7 6	4 10 0
250		1 5 0	2 10 0	3 15 0	5 0 0
275		1 7 6	2 15 0	4 2 6	5 10 0
300		1 10 0	3 0 0	4 10 0	6 0 0
350		1 15 0	3 10 0	5 5 0	7 0 0
400		2 0 0	4 0 0	6 0 0	8 0 0
450		2 5 0	4 10 0	6 15 0	9 0 0
500		2 10 0	5 0 0	7 10 0	10 0 0
Exceeding £500 but not exceeding £3,500	No *ad valorem* duty (see note 5)	5s. for every £50 or fractional part of £50	10s. for every £50 or fractional part of £50	15s. for every £50 or fractional part of £50	£1 for every £50 or fractional part of £50
Exceeding £3,500 but not exceeding £4,500		5s. for every £50 or fractional part of £50	10s. for every £50 or fractional part of £50	15s. for every £50 or fractional part of £50	£1 for every £50 or fractional part of £50
Exceeding £4,500 but not exceeding £5,250			10s. for every £50 or fractional part of £50	15s. for every £50 or fractional part of £50	£1 for every £50 or fractional part of £50
Exceeding £5,250 but not exceeding £6,000				15s. for every £50 or fractional part of £50	£1 for every £50 or fractional part of £50
Exceeding £6,000					£1 for every £50 or fractional part of £50

REVOCABLE SETTLEMENTS:

A Note on the Finance Bill

By D. C. Potter, Barrister-at-Law

Clause 18 of the Finance Bill affects a not uncommon type of family settlement in such a way that prompt action may be required on the part of solicitors in order to prevent the payment of unnecessary tax by the settlor.

Clause 18 is designed to widen the scope of section 404 of the Income Tax Act, 1952. That section was designed to make income tax and surtax payable on the income of "revocable settlements," as if such income were in fact the top slice of the income of the settlor. The general scheme of subsection (2) of section 404 is that a settlement is "revocable" if any person has power "to revoke or otherwise determine the settlement or any provision thereof," and upon the exercise of that power the settlor or his or her spouse becomes beneficially entitled to any part of the settled funds or the income thereof. Thus, if a man settled a fund upon trusts for a class of beneficiaries, with power for the trustees to appoint sums of capital among the beneficiaries, then, if his wife is one of the beneficiaries, the whole income of the settled funds is treated for surtax purposes as the income of the settlor, irrespective of whether or not the power is in fact exercised in favour of the wife. It was for a long time, however, considered by many draftsmen that a power conferred upon the trustees by a settlement to pay capital to the wife of the settlor was not caught by subsection (2) provided that it was expressly limited to part only of the settled funds, and in practice it was common to provide that the power should extend to the whole of the settled funds apart from £100 thereof. Recently the House of Lords held, in *I. R. C.* v. *Saunders and Others* [1957] 3 W.L.R. 474, that a power drafted in these terms was not a power "to revoke or otherwise determine the settlement or any provision thereof" within the meaning of section 404 (2), thus confirming the view widely held among the profession.

The result of the *Saunders* decision is that a settlement is caught by section 404 if the trustees have an unlimited power

to appoint capital to the spouse of the settlor, but is not caught if that power extends only to part of the settled funds.

In his budget speech the Chancellor of the Exchequer said (see *Hansard*, Vol. 586, No. 88, col. 62) that he proposed to restore the law to what was originally intended. Now it is reasonably clear what was originally intended by section 404 (2). It was that if the trustees or any other person had the power to restore part of the trust fund to the settlor or his spouse, the income of that part should at all times be treated for tax purposes as income of the settlor. Reading the *Saunders* decision and the speech of the Chancellor of the Exchequer, one might have supposed that the amendment required was simply to substitute for the words "to revoke or otherwise determine the settlement" in section 404 (2) (a) the words "wholly or partially to revoke or otherwise determine the settlement" and to make any consequential amendments.

Clause 18 of the Finance Bill, however, treats the matter as being one of considerable complexity. The result may well be something different from what the Chancellor intended. He said that he proposed to restore the law to what was originally intended; but it is possible to construe clause 18 (2) as going much further than this. It provides that references in section 404 (2) to a "power to revoke or otherwise determine a settlement" shall be deemed to include, first, any power to diminish the property comprised in the settlement and, secondly—and the justification for this provision is difficult to see—any power "to diminish the amount of any payments which are or may be payable under the settlement or any provision thereof or which are or may be so payable to any person other than the settlor and the wife or husband of the settlor." It would be charitable to assume that the Bill has been misprinted. Even so, it is arguable that the proposed amendment extends section 404 not only to what was originally intended, but much wider, namely, so as to catch the type of settlement which has been very common in practice, where the spouse of the settlor has been a person entitled to receive income, but not entitled to capital under any circumstances, under the settlement. Now the *Saunders* case dealt with a settlement where the trustees had power to give capital to the spouse of the settlor. In order to reverse the effect of that decision it is not necessary to attack the type of settlement where the spouse of the settlor cannot get the settled capital, but may get part of the income. It is therefore submitted that clause 18 (2) (b) should be omitted from the Bill, if the proposal in the Chancellor's speech means what it says.

A further point arises under clause 18 (4) of the Bill. This is intended to give taxpayers a chance to rectify existing settlements, by removing from them any power which will offend against section 404 as amended. It exempts from the extended clause 404 any settlement otherwise caught if the offending power "has been released or disclaimed at the expiration of 3 months from the passing of this Act." Two important points require to be considered here. First, a burden is placed upon solicitors to refer to any settlement with which they are concerned, with a view to executing the necessary release or disclaimer: and this must be done within three months of the passing of the Act. It is respectfully submitted that three months is a very short time indeed for this purpose, and that a more reasonable period would have been a whole year, which could be extended in individual cases at the discretion of the Commissioners of Inland Revenue. In practice many trustees will not realise that their settlement is caught by the extended section 404, until the Inspector of Taxes calls their attention to this fact. The second point for consideration is that if the offending power in any particular case is a power of appointment in relation to capital and is conferred upon the trustees of the settlement as such trustees, they are not able to release or disclaim it. As the law stands, a power vested in a person in a fiduciary capacity is not, unless otherwise expressly provided in the terms of the power, capable of being released or disclaimed. It would thus appear that the exemption intended to be provided by clause 18 (4) of the Bill is not particularly generous. One can only hope that the whole clause will receive the severest scrutiny from the legislature, so that it does not do more than what it is meant to do, namely, to reverse the decision in the *Saunders* case.

SECURING IMMEDIATE BENEFIT FROM STAMP DUTY REDUCTIONS

By J. L. M. Bowyer, Barrister-at-Law

Clause 28 of the Finance Bill, 1958, provides for reductions of up to £52 10s. in the stamp duty on conveyances or transfers on sale of land where the consideration is £6,000 or less. Since an instrument must be stamped " in accordance with the law in force at the time when it was first executed " (*a*), it will be in the interest of an intending purchaser to secure that his vendor does not execute the conveyance or transfer before August 1, 1958, when the proposed reductions are to come into effect. In some cases it may be found impracticable to postpone completion. To meet this difficulty the following method is suggested whereby a contract for the sale of land may be " completed " before August 1, although the conveyance or transfer need not be executed until August 1 or later.

On the day fixed for completion the vendor's solicitor will hand over to the purchaser's solicitor a simple receipt for the purchase money signed by the vendor over a twopenny stamp together with a power of attorney (stamp 10s.) duly executed by the vendor in favour of the purchaser's solicitor, authorising him to execute the already engrossed conveyance or transfer, a copy of which is set out in the schedule to the power of attorney (*b*). A purchaser intending to embark on such a course would probably be well advised to register his contract as a land charge Class C (iv) or, in the case of registered land, to obtain entry of notice of his contract under section 49 (1) (c) of the Land Registration Act, 1925.

(*a*) Stamp Act, 1891, s. 14 (4).
(*b*) For a precedent of such a power of attorney, see *post*, p. 722.

NOTES OF RECENT CASES

1. *REAL PROPERTY*

By F. R. Crane, ll.b., Solicitor

Silver v. *Silver* [1958] 1 W.L.R. 259;
[1956] 1 All E.R. 523 (C.A.)

Matrimonial home—dispute as to ownership between husband and wife—presumption of advancement—Married Women's Property Act, 1882, *s.* 17.—This was another in the series of disputes about the ownership of matrimonial homes which have come before the courts. The parties married in 1931, and in 1933 purchased the first of four matrimonial homes. £90 deposit was provided by the wife's parents; the property was conveyed to the wife and she mortgaged to a building society, the husband joining as guarantor. The subsequent matrimonial homes were purchased out of the proceeds of sale of the earlier ones, plus loans on mortgage, the arrangements as to the conveyance and mortgage being the same. All the houses appreciated in value between purchase and sale and on one transfer, in 1948, some £1,000 became spare and this was dealt with by the wife; she gave her husband £400 to buy a car for himself, and spent the rest on the children. The husband paid all mortgage instalments, either directly or by giving his wife a weekly allowance out of which she paid. The marriage broke down in 1956 and the present dispute concerned the ownership of the fourth matrimonial home. The county court judge held that the equitable presumption of advancement, raised by purchase by a husband in the name of his wife, had not been rebutted, so that the matrimonial home belonged to the wife. The Court of Appeal (Lord Evershed M.R., Parker and Sellers L.JJ.) reluctantly refused to interfere with this decision, on the ground that the county court judge had seen the witnesses and heard much evidence, and had applied the correct principles. It was conceded in the Court of Appeal that as regards mortgage payments made after the separation the husband was by subrogation entitled to a charge on the property.

This decision is noteworthy both for the Court of Appeal's strong expression of preference for equality of division in such cases, and for its equally strong decision that the equitable presumption of advancement must be applied unless rebutted. Lord Evershed said, " where the subject-matter is such as the matrimonial home or what might be called part of the matrimonial joint stock—furniture and so forth—it is obviously tempting to say that equity delighteth in equality and that the subject-matter should be treated as a joint investment in the true sense, so as to allow each to share equally in it. However tempting it is, I think that there are difficulties in the way of so broad and general a view. . . . There is a rule of equity which still subsists, even though in this day and age one may feel that the presumption is more easily capable of rebuttal—a rule that if a husband pays for or

puts property into the name of a wife, he intends to make an advancement to her . . . there is an obvious temptation to say that a fair result would be to say that there was a joint enterprise and the two should be jointly entitled; but if we so concluded, we should in effect be inventing a case. . . . Indeed, I feel that if in this case the Court of Appeal were to say that equity favoured equality, we should determine by anticipation that nearly all cases relating to the matrimonial home should likewise follow suit. I do not think that would be right" ([1958] 1 W.L.R. at pp. 261, 263; [1958] 1 All E.R. at pp. 525, 526). Parker L.J. said that "in the present age, common sense dictates that such an asset should be treated as the joint property of both, in the absence of evidence to the contrary," citing the remarks of Denning L.J. in *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63, at p. 74, but added that the presumption of advancement "is too well established to be disregarded" ([1958] 1 W.L.R. at pp. 264, 265; [1958] 1 All E.R. at p. 527). Sellers L.J. likewise agreed with regret.

The only development in the law here, therefore, is that the Court of Appeal has said that the presumption of advancement may be fairly easily rebutted in cases concerning the matrimonial home. Apart from this the doctrine of judicial precedent has proved too strong to allow a change in the law. In the present time of equality between the sexes husbands seem to need emancipation by legislation from the presumption of advancement. (See generally (1956) 20 Conveyancer 467, "Beneficial Ownership of the Matrimonial Home," by A. G. Guest.)

Re Knight's Question [1958] 2 W.L.R. 685; [1958] 1 All E.R. 812 (Ch.D.)

Husband and wife—dispute over property—title deeds held by husband as trustee in possession of wife—jurisdiction—Married Women's Property Act, 1882, *s.* 17.—This decision concerned the extent of the jurisdiction under the Married Women's Property Act, 1882, s. 17—"in any question between husband and wife as to the title to or possession of property. . . ." A husband in 1950 purchased freehold land (which did not include the matrimonial home) on behalf of a partnership consisting of himself and his brother; subsequently he declared himself trustee for a company which took over the partnership, and at the material date he simply held the legal estate as bare trustee for the company. He kept the title deeds in the matrimonial home, and on leaving when his marriage broke up did not take them away. The wife now refused to deliver up the deeds, though she claimed no beneficial interest. Harman J. held (1) though the value of title deeds depends on their evidence of ownership of property, nevertheless they were themselves "property" within section 17; and (2) despite the fact that the husband was a bare trustee without beneficial interest and the wife a stranger to the property, there was nevertheless a dispute between husband and wife as to possession of the deeds falling "fairly and squarely within the words of section 17."

This literal interpretation results in a decision which appeals to common sense. An action in tort for conversion or detinue would be

the normal way of recovering title deeds, and of course a husband cannot sue his wife in tort (Married Women's Property Act, 1882, s. 12). Yet it would be intolerable if beneficiaries' interests were to be prejudiced merely because their trustee happened to be a married man who had quarrelled with his wife. (In the present case, though the husband had no technical beneficial interest in the property, he may have had interests in the company which would provide more justification than appears in the report for the wife's refusal to hand over.)

It may also be remarked that the original conveyance to the husband alone as trustee for a partnership created a tenancy in common of the beneficial interests (*Lake* v. *Craddock* (1732) 3 P.W. 158), so the husband held as sole trustee for sale (*Bull* v. *Bull* [1955] 1 Q.B. 234). Probably he could pass a valid title to a purchaser for value without notice (*Re Rayleigh Weir Stadium* [1954] 1 W.L.R. 786; though compare *Bull* v. *Bull, supra,* at [1955] 1 Q.B. at p. 238), but otherwise it would be necessary to appoint a second trustee to make a sale, or to bring the equities on the title.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Re Richardson's Will Trusts [1958] 2 W.L.R. 414; [1958] 1 All E.R. 538 (Ch.D.)

Protective trusts—forfeiture—effect of court order to charge property—Trustee Act, 1925, *s.* 33.—The determinable interest is a potent and sometimes indiscriminate weapon in the hands of a settlor or testator, for determination will occur if an event falls within the literal ambit of the words in the instrument, whether or not such an event was likely to have been contemplated. Protective and discretionary trusts have often produced unexpected results. Thus it has only recently been settled, after controversy, that the exercise of statutory or express powers of advancement of capital will not work a forfeiture of income held on discretionary trusts (*Re Rees* [1954] Ch. 202; noted *ante,* Vol. 18, p. 82; accepted in *Re Moxon's Will Trusts* [1958] 1 W.L.R. 165; [1958] 1 All E.R. 386, noted *ante,* p. 144); again, payments on behalf of lunatics sometimes worked forfeitures until the law was altered by the Law Reform (Miscellaneous Provisions) Act, 1949, s. 8: see *Re Westby's Settlement* [1950] Ch. 296, and compare *Re Oppenheim's Will Trusts* [1950] Ch. 633.

In the present case property was held on the protective trusts of the Trustee Act, 1925, s. 33, for L. E. until he attained 35 and then, if he had not done or attempted to do anything that would deprive him of the right to receive capital and income, for him absolutely but otherwise " on protective trusts for the benefit of the said L. E. during his life in accordance with section 33 of the Trustee Act, 1925," and

upon trust after his death for his children. Before L. E. attained 35 an order was made in 1955 in divorce proceedings requiring him to charge on the settled property the sum of £50 p.a. to his wife, but no deed to this effect was ever executed. L. E. attained 35 in 1955, after the said order, and was made bankrupt in 1956. Danckwerts J. had no difficulty in holding (1) that the order of the court, *per se*, imposed an equitable charge on the settled property (following *Hyde* v. *Hyde* [1948] P. 198), and (2) that such a charge worked a forfeiture so that the trustee in bankruptcy could take nothing. (Counsel on behalf of the trustee in bankruptcy was not permitted, in the absence of the wife, to adduce arguments based on the Bankruptcy Act, 1914, ss. 40, 42, which make certain settlements void against creditors.)

The reporting of this case requires a brief comment. The learned judge is reported in [1958] 1 W.L.R. at p. 419 as saying the property was to be held during the remainder of L. E.'s life on the trusts of the Trustee Act, 1925, s. 33 (1) (i). This trust, however, is to pay to the principal beneficiary until he charges, etc.—the discretionary trust is in section 33 (1) (ii). Presumably the latter is meant—see the question asked—[1958] 1 W.L.R. at p. 416. The All England Report does not give sufficient detail to provide a check on this point. The original will was awkwardly worded, as demonstrated by the quotation above, because it gave the property on the protective trusts of section 33, and then declared that if a forfeiture took place it should be held, on L. E.'s attaining 35, on the protective trusts of section 33. Those trusts, however, constitute a simple trust for payment of income followed by a discretionary trust after forfeiture. On a very literal reading, therefore, it could be said that a new protective trust arose when L. E. attained 35, a second forfeiture at once being worked. Under neither construction could the trustee in bankruptcy take.

Re Grimthorpe, deceased [1958] 1 W.L.R. 381; [1958] 1 All E.R. 765 (Ch.D.)

Costs—trustees—basis of taxation.—A Practice Direction of 1953 (reported [1953] 1 W.L.R. 1365; [1953] 2 All E.R. 1159) stated that orders for trustees' costs should direct taxation of their "costs and expenses of and incident to" the relevant matter, without adding the words "as between solicitor and client." Vaisey J. subsequently explained (Practice Note, reported [1953] 1 W.L.R. 1452; [1953] 2 All E.R. 1408) that the intention of the Practice Direction was to give trustees "almost the same as costs on an indemnity basis, or costs as between solicitor and own client." In the present case trustees had paid counsel's fees amounting to some £54 but the taxing master had reduced this figure by half to £27, regarding this as fair and reasonable and basing his views on R.S.C., Ord. 65, r. 27 (29), which says necessary or proper fees shall be allowed but not, *inter alia*, "special fees to counsel or other unusual expenses." Danckwerts J. now held that the taxing master had misdirected himself. The learned judge said that the purpose of the Practice Direction was to give trustees indemnity and the correct question was whether the payments

were proper or improper; the only difference between an individual and a trustee was that the latter could not pay what he liked but must use his judgment to save the estate money which need not be paid out. In this instance the trustees having paid counsel's fees, demanded and agreed in good faith, were entitled to indemnity.

Prescott (*orse. Fellowes*) v. *Fellowes* [1958] 2 W.L.R. 679; [1958] 1 All E.R. 824 (P.D. & A.)

Variation of settlement—gift as ante-nuptial settlement—Matrimonial Causes Act, 1950, *s.* 25.—Immediately prior to marriage in 1953 the prospective wife by a deed made in consideration of marriage (i) agreed to transfer to the prospective husband £15,000 in securities " as an absolute gift unaffected by anything hereinafter contained " and (ii) covenanted to pay a further £20,000 on certain conditions in the event of the husband being able to obtain a recommendation for membership of Lloyd's. The £15,000 was paid, but not the £20,000, and the wife obtained a decree of divorce in January of this year. Stevenson J. now held that the sum of £15,000 constituted an ante-nuptial settlement within the Matrimonial Causes Act, 1950, s. 25, and ordered an inquiry as to the present state of investments, since there was evidence that the money was still held by the husband. The learned judge said that having regard to the nature of the deed the words " as an absolute gift " did not oust jurisdiction, while the cases on post-nuptial settlements (*e.g., Halpern* v. *Halpern* [1951] P. 204 and cases there cited) showed that under section 25, *supra,* the word " settlement " must be liberally construed.

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3. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re White, decd., McCann v. *Hull* [1958] 2 W.L.R. 464; [1958] 1 All E.R. 379

Bequest of " business "—what passes—position as to premises used.—The All England Report of this case is accurate but the Weekly Law Reports have not been too happy with it: the second and third lines after the word *" Held "* in the headnote have been transposed, so that the effect of the judgment is reversed, and the paragraphs (iv) and (v) of the summons on page 465 are referred to as (v) and (vi) on page 471, as a result of some confusion due to the abandonment of two heads of claim and an apparent re-numbering at the hearing.

The question what passes under a bequest of a " business " is fascinating for the lawyer. Each case must be separately construed but they are presented so baldly in the books that a digression might

be permitted which may throw some light on the actual state of the law. In *Re Henton* (1882) 30 W.R. 702 a bequest of a business was held not to pass freehold premises on which the business was carried on, but Fry J. specifically based this result on the contemporary tenderness for the heir-at-law of real estate, and this case can probably be disregarded since 1925. In *Re Hawkins* (1914) 109 L.T. 969 a bequest of "business and plant" was held to pass the lease of the premises, but Astbury J. was not drawing any basic distinction between real and personal property. In that case the legatees of the business were charged with the payment of an annuity. The learned judge held that the testator must have intended the lease and his bank balance to pass with the business, as otherwise the legatees would not have had the funds to keep up the annuities. In an unreported case of *Re Abbott* freehold premises did pass with a bequest of business, stock and plant. In *Re Rhagg* [1938] Ch. 828 a solicitor went into partnership with his clerk and bequeathed him his "business as a solicitor" and office furniture, law books and other office articles. It was argued that "business" merely meant goodwill, which Simonds J., as he then was, rejected as far too narrow, and that *expressio unius, i.e.,* the office equipment, excluded the premises, which was rejected because the testator had already referred to goodwill and so not used any firm category. Simonds J. made two very convincing points: (i) if the lease of the premises did not pass, the business would have to be evicted in the ordinary course of administration, which is unlikely to have been the testator's intention; (ii) the same meaning must be applied as if the testator were leaving his share in the partnership to a third party, in which case the clerk could not have claimed to exclude such person from the benefit of the lease—the lease was a partnership asset. In *Re Betts* [1949] 1 All E.R. 568 the freehold of business premises did not pass, but this is very clear from a consideration of the terms of the bequest, which referred to goodwill, stock, utensils, vehicle and plant. Roxburgh J. considered none of these limited expressions as apt to pass the site, but he would probably have distinguished a gift of a "business" generally. *Jarman* (8th ed.), Vol. 2, 1299, seems sound when it sums up the principles of these cases as (a) did the testator treat the premises as one of the assets of the business; (b) is there anything in the will requiring the bequest to be more narrowly construed?

In the instant case the testator left his "business of house furnisher," carried on at a specified address, to M. and B. in shares, and his residue to M. B. claimed various items, most of which were allowed. Wynn Parry J. emphasised that the trend in modern cases has been to be more liberal towards the legatee of the business than in the last century. The freehold premises were part of the assets of the business and therefore shared by B. There was a direction in the will that B. should continue to carry on the business, which could hardly have been possible if B. were to be evicted.

In addition to the point about the premises the learned judge dealt with some less thorny problems. He held that all the stock-in-trade at the premises passed to B. as business assets and that book debts owed to the business passed in the same way. He also held, on a point on which the authorities are rather inadequate or badly reported, that B. must be liable for all the liabilities of the business. This is

a matter of principle, and *Jarman* (p. 1300) based it on elementary fairness—*Qui sentit commodum sentire debet et onus.*

(Theobald 200; Williams on *Executors* (Vol. 2), 627)

Re Castigilione's Will Trusts [1958] 2 W.L.R. 400; [1958] 1 All E.R. 480

Shares in private company—voluntary bequest to company—how effectuated.—A company cannot purchase its own shares, as that reduces its capital. It may accept a gift of fully paid up shares as no calls can be made and the shareholder's liability has gone. On the other hand there is no reason why partly paid up shares should not be voluntarily given to a company provided some shareholder remains liable for the balance due. The procedure is for the company to nominate some person to take the shares on trust for the company, the nominee being personally liable to calls, but bound to vote as the company directs. If the company is one whose articles prohibit transfers of shares to outsiders, then the nominees must be selected from among the group eligible to hold shares, *e.g.*, members of the family. Danckwerts J. followed *Kirby* v. *Wilkins* [1929] 2 Ch. 444 and the cases there cited. This is mainly a company law point but it is certainly likely to arise in many executorships these days when so many companies are "family affairs" and shareholders take a personal sentimental interest in their companies.

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4. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Penn and Another v. *Gatenex Co., Ltd.* [1958] 2 W.L.R. 606; [1958] 1 All E.R. 712 (C.A.)

Covenant—block of flats—grant of flat "with use of fixtures and fittings" belonging to landlord—covenant for quiet enjoyment—refrigerator designed to be operated from central installation—whether landlord liable for provision of motive power.—The true construction of the tenancy agreement in this case, in which leave has been given to appeal to the House of Lords, has already given rise to an acute conflict of judicial opinion. In 1942 the original landlords granted to the tenants a flat in a block of flats "with the use of the fixtures and fittings therein belonging to the landlords." They also entered into a covenant for quiet enjoyment in the usual form. One of the fixtures and fittings in the flat was a refrigerator, which was designed to be operated from a central installation under the sole control of the landlords and serving all the flats. There was no larder or other facility for the storage of food in the flat: and in 1956 the working

of the refrigerator, which had always been intermittent as a result of deficiencies in the mechanism, ceased completely owing to the failure of the landlords to take any steps to repair the mechanism. The question which arose was whether, according to the true construction of the contract, the landlords had, either expressly or by necessary implication, promised to provide the necessary motive power to the refrigerator and to keep it in reasonable working order.

The Court of Appeal held by a majority, overruling the county court judge, that no such promise had been given. The majority of the court (Lord Evershed M.R. and Parker L.J.) rejected the argument of counsel for the tenant, that the promise contained in the habendum, that the tenants should have the use of (*inter alia*) the refrigerator, imposed upon the landlords an express obligation to see that the refrigerator remained capable of use as such. Nor, in their view, was it necessary or, indeed, possible to imply an obligation of that nature. The implied term, if any, would have to be applicable to all fixtures and fittings, and it was impossible to formulate any such term precisely. If the use of the refrigerator had been specifically mentioned, the position might well have been different: but it was merely demised as one of the fixtures. In reaching this conclusion they also relied on the decisions of the Divisional Court in *R.* v. *Paddington and St. Marylebone Rent Tribunal, ex p. Bedrock Investments, Ltd.* [1947] K.B. 984 and *R.* v. *Croydon and District Rent Tribunal, ex p. Langford Property Co., Ltd.* [1948] 1 K.B. 60, in which the grant of a right to use lavatory accommodation and bathrooms in the one case and the grant of central heating radiators in the other were held not to imply a covenant by the landlord to supply hot water.

Sellers L.J., however, dissented. He drew a distinction between the usual case of fixtures complete in themselves and wholly under the control of the tenants, and the more unusual case of fixtures, part (in this case a substantial part) of which are under the sole control of the landlords. These landlords had contracted to give the use of the refrigerator, which upon the facts was a vital service. In the circumstances, therefore, he agreed with the county court judge that the landlords had expressly contracted to supply the means of refrigeration.

Bathavon R. D. C. v. *Carlile* [1958] 2 W.L.R. 545; [1958] 1 All E.R. 801 (C.A.)

House let by local authority—review increasing rent—effect of review—notice to quit—weekly tenancy—form of notice.—On a Monday in 1955 the plaintiff council let a dwelling-house to the defendant on a weekly tenancy, terminable by either side by the giving of one week's notice in writing "before 12 noon on any Monday." In August, 1956, having reviewed the rent of the premises under section 85 (6) of the Housing Act, 1936, the council gave notice to the defendant that his rent would be increased as from April 1, 1957. The defendant did not pay the higher rent, and on June 19, 1957, the council gave him a notice to quit the premises "by noon on Monday the first day of July, 1957." The defendant did not comply with the notice.

Upon these facts the Court of Appeal rejected as untenable the contention of the council that the effect of the notice of August, 1956, was to make the tenant liable for the increased rent even though his original weekly tenancy had not been terminated. There is nothing in section 85 (6) of the Act which enables a local authority landlord to override the contractual rights and obligations of the parties. The court also held that the notice to quit was invalid. A notice to quit must expire at the end of a current period of the tenancy. It was agreed that the weekly tenancy in this case ran from Monday to Sunday midnight, and that a notice expiring "on Monday" would have been good, since a notice to quit at the first moment of an anniversary (in the case of a yearly tenancy) ought to be as good as a notice to quit at the last moment of the day before (*Sidebotham* v. *Holland* [1895] 1 Q.B. 383), and this principle applies to weekly tenancies (*Crate* v. *Millar* [1947] K.B. 46). But the addition of the words "by noon" in the notice to quit was fatal. Although "on Monday" can be construed as meaning at the first moment of Monday, the words "by noon on Monday" cannot be construed in that way. Nor could the notice be construed as a notice to quit at Sunday midnight coupled with a licence to remain till Monday noon.

Samrose Properties Ltd. v. *Gibbard* [1958] 1 W.L.R. 235; [1958] 1 All E.R. 502 (C.A.)

Rent Acts—lump sum payment—rent less than two-thirds of rateable value—premium or commuted rent—whether tenant protected.—The landlords in this case, in the course of a perfectly open and honest attempt to create a tenancy to which the Rent Restrictions Acts would not apply, had required the tenant to sign three documents, namely (1) an application for a tenancy containing particulars of his financial circumstances and of the state of his family and the names and addresses of two referees, (2) (one week later) a written agreement dated August 23, 1955, whereby the landlord agreed in consideration of a payment of £35 to grant a lease of the premises in the form of a draft annexed to the agreement, and (3) (again one week later) a lease dated August 30, 1955, for one year at a rent of £1 per quarter, *i.e.*, just less than two-thirds of the rateable value of the premises, which was £7 per annum. But the agreement of August 23, 1955, was made conditional upon the landlords being satisfied with the suitability of the applicant, and the applicant was required, by the same agreement, to furnish references forthwith. Lord Evershed M.R. observed (on the authority of passages from the judgment of Cohen L.J. in *Regor Estates, Ltd.* v. *Wright* [1951] 1 K.B., at p. 698, and from his own judgment in *Woods* v. *Wise* [1955] 2 Q.B., at p. 44), that "it is plainly a matter to which this court must properly address itself in matters where the Rent Restrictions Acts might be said to apply, whether the transaction, viewed as a whole and according to the substance of it, is in truth one which . . . is on that side of the line which frees the premises from the impact of the Act, or whether, so regarded, the transaction is one which is of the mischief which the Acts were designed to avoid." Applying that

principle the court held that upon the true construction of the agreement and the lease in this case the sum of £35 paid under the agreement was in substance commuted rent. The arrangements made were out of all proportion to their subject-matter, a lease of two rooms for twelve months only. Moreover, the agreement of August 23, 1955, served no useful purpose, in that (1) it did not bind the landlords to grant a lease if they were for any reason dissatisfied with the tenant, and (2) references had already been provided. The substance of the matter, therefore, was that the premises had been let at a rent of £39 per annum, considerably more than two-thirds of the rateable value, so that the exemption from the impact of the Rent Acts conferred by section 12 (7) of the Act of 1920 did not apply.

Holland v. *Ong* [1958] 2 W.L.R. 448; [1958] 1 All E.R. 574 (C.A.)

Rent Acts—premises within the Acts—ascertainment of rateable value—flat and garage in London assessed jointly in valuation list at £76—alteration of list on application of tenant of flat—flat assessed at £40, garage at £44—alteration retrospective to before material date—whether flat shown in valuation list—whether rateable value varied—Act of 1957, *Sched. V, paras.* 1, 2.—Section 11 of the Rent Act, 1957, as is well known, released from the control of the Rent Acts all dwelling-houses in London, the rateable value of which, on November 7, 1956, exceeded £40. This was an application by the landlord of a flat and garage in London, formerly rated as one hereditament at £76, for an apportionment of the rateable value of the premises under paragraph 1 (b) of the Fifth Schedule to the Act, in order to ascertain the rateable value of the flat on the material date, referred to in the Schedule as the " date of ascertainment." The tenant, who had already obtained an alteration of the valuation list pursuant to section 40 of the Local Government Act, 1948, as a result of which the flat was separately assessed at £40 and the garage at £44, relied on paragraph 2 (1) of the same schedule which provides that " where after the date of ascertainment the valuation list is altered so as to vary the rateable value of a hereditament and the alteration has effect from a date not later than the date of ascertainment . . . the rateable value on the date of ascertainment of any dwelling house consisting of or wholly or partly comprised in that hereditament shall be ascertained as if the amount of the rateable . . . value of that hereditament shown in the valuation list on the date of ascertainment had been the amount of that value shown in the list as altered. . . ." He contended, in other words, that the rateable value of the flat for the purposes of the Act of 1957 had already been fixed at £40, and did not fall to be ascertained by apportionment of the original £76 under paragraph 1 (b). Counsel for the landlord, on the other hand, argued that paragraph 2 (1) did not apply to this case since (1) the flat by itself was not a hereditament " shown in the valuation list," before the list was altered, and (2) even if it was so shown, the list had not been altered " so as to vary the rateable value " of the hereditament. The Court of Appeal held that although paragraph 2 (c) is primarily

directed to a straightforward case of the variation of the value originally appearing in the valuation list attached to the description of a particular hereditament, its terms are also apt to cover a "splitting operation" such as occurred in the present case. The flat was itself a "hereditament": and, although part of a larger hereditament, the rateable value of which could only be ascertained by apportionment of the rateable value of the whole, the flat was in fact shown in the valuation list before the alteration. Moreover, despite the difficulty in regarding the known figure of £40 as an alteration from an unknown figure, part of the £76 notionally to be attributed to the flat, the alteration of the assessment of the premises as a whole to two separate assessments of £40 and £44 respectively might fairly be regarded as by itself an alteration varying the rateable value of the flat.

Leave to appeal to the House of Lords was refused.

British Land Co., Ltd. v. *Herbert Silver (Menswear), Ltd.*
[1958] 2 W.L.R. 580; [1958] 1 All E.R. 833 (C.A.)

Rent Acts—premises within the Acts—house let as a separate dwelling—business premises with living accommodation—sitting tenant in residential part at time of lease.—The Court of Appeal held in this case that a letting of premises consisting of a shop and living accommodation is a letting to which the Rent Restrictions Acts apply, even though there is a sitting tenant in possession of the living accommodation at the time of the lease.

In 1947 the plaintiff landlords purchased the freehold of the premises subject to a lease, which was due to expire in 1956, at a rent of £90. In 1953 the tenant sublet the residential part of the premises (with the consent of the plaintiffs) on a weekly tenancy at a rent of £1 per week. In 1955 the tenant agreed to sell the goodwill of the business, which she carried on in the shop, to the defendants, provided that she could obtain a new lease for a term of 15½ years from December, 1954, at a rent of £325 per annum. In the same year the tenant duly obtained a new lease on these terms from the plaintiffs (surrendering her old lease) and immediately assigned the new lease to the defendants. In 1956 the defendants claimed that the premises were subject to the Rent Acts, so that they were entitled to the return of the difference between the contractual rent at the rate of £325 per annum and the standard rent at the rate of £90 per annum. They also refused to pay more than the standard rent in future. In an action for arrears of rent brought by the plaintiffs in 1957 the county court judge gave judgment for the defendants and the Court of Appeal upheld his decision. The question was whether, bearing in mind section 3 (3) of the Act of 1939 (which provides that the application of the Acts to any dwelling-house shall not be extended by reason only that part of the premises is used for business purposes), the premises in this case had been let as a separate dwelling. The demised premises included the residential part: and the presence of the sitting tenant showed conclusively that the parties intended that part to be used as a separate dwelling-house. The Rent Acts,

therefore, applied (see Megarry on the *Rent Acts* (8th ed.), p. 58: *Wolfe* v. *Hogan* [1949] 2 K.B. 194).

Regis Property Co., Ltd. v. *Dudley* [1958] 2 W.L.R. 356; [1958] 1 All E.R. 510 (C.A.)

Rent Acts—Act of 1957—*rent limit—appropriate factor—fair wear and tear—reasonable charge for services—depreciation of plant —allowance for profit.*—This was an application in the nature of a test action by the landlords of a block of flats to determine the amount of the increase of rent which they might lawfully demand under the Rent Act, 1957, in respect of one of the flats. The tenants had covenanted (*inter alia*) (1) "to keep the interior of the flat together with all the fixtures and fittings now or hereafter therein (including the doors windows sanitary and water apparatus thereof) in good and substantial repair and condition (fair wear and tear and damage by accidental fire excepted) . . ." and (2) to observe and perform the rules and regulations in the schedule to the lease. The landlords had covenanted (*inter alia*) (1) "to supply and use its best endeavours to maintain at all times at its own cost an efficient service of hot water for domestic purposes through the central heating installation and for the heating of the radiators to the flat through the central heating installation . . ." and (2) "to light the staircase landing and corridors of the building. . . ." Under the rules and regulations in the schedule the tenants were responsible for keeping "all baths sinks cisterns and waste and other internal pipes in or connected with their flats clean and open and in proper repair and order": and it was assumed for the purposes of the appeal (though not decided) that the county court judge was right in applying the fair wear and tear exception without any qualification to this rule. But the landlords had expressly taken over responsibility for washering and re-seating the taps. The questions which arose related to (1) the appropriate factor by which the gross value of the flat should be multiplied in order to arrive at the basic rent, and (2) the matters to be taken into account in fixing a reasonable charge for services provided by the landlords.

With regard to the appropriate factor the Court of Appeal held that in cases where the tenant is responsible for some, but not all, repairs a court must be guided by the extent of the burden cast on the tenant by the terms of the letting. The fixing of the exact figure between the upper limit of two and the lower limit of one-and-one-third is a matter for the discretion of the county court judge, whose finding will not be disturbed on appeal, provided that he has not misinterpreted as a matter of law the nature and extent of the repairing obligations of the landlord and the tenant respectively. It was argued, however, that in fixing the appropriate factor exactly halfway between the two limits in the present case the county court judge had misinterpreted the respective repairing obligations of the parties in that (1) the exception of "fair wear and tear" rendered the tenant's obligations merely nominal, and (2) the judge had taken into account the cost of repairing damage caused by the carelessness of the

tenant—" the sort of things " (such as the repair of cracked wash-basins) " that happen in flats and cannot be regarded as fair wear and tear "—liability for which does not arise solely under the agreement. But the court rejected both these submissions. The effect of a " fair wear and tear " exception depends largely on the facts of each case: it does not necessarily reduce the scope of a repairing covenant to practically nothing at all: see *Terrell* v. *Murray* (1901) 17 T.L.R. 570, *Citron* v. *Cohen* (1920) 36 T.L.R. 560, *Brown* v. *Davies* [1957] 3 W.L.R. 818, 825, 828; [1957] 3 All E.R. 33 (noted at p. 70, *ante*). Nor does the fact that there may be collateral liability for negligence at common law in respect of the same damage prevent responsibility arising in contract under the express terms of the agreement. Thus, although the judge's estimate of the cost of the tenant's repairs was, in the view of the Court of Appeal, generous to the tenant, it was not possible to say that he had exercised his discretion on a wrong basis.

Upon the question of a reasonable charge for the services, however, the appeal was allowed. The Court of Appeal held, contrary to the opinion of the county court judge, that a reasonable charge for services must include both (1) some allowance for depreciation of wasting assets and (2) a fair figure by way of profit, *i.e.*, fair in all the circumstances of each case. But the allowance for depreciation, it was held, should be calculated by taking the actual cost of the plant when originally installed and dividing it by the number of years in its actual past and estimated future life: it should not be based (as the landlords claimed) on the cost of replacement. In allowing a fair profit the court was influenced by the fact that Parliament has used the expression " reasonable charge " (which would include a profit element in order to compensate the landlord for his ultimate responsibility) as distinct from " reasonable cost." But the calculation of the amount (if any) allowed as a fair profit must depend upon the facts of each case. In the present case, for example, it was held that nothing should be allowed on the amount charged for maintenance carried out by a wholly owned subsidiary company of the landlords, since the profit on that work had already been allowed to the landlords by way of rebate.

Leave to appeal to the House of Lords was granted.

Piper v. *Harvey* [1958] 2 W.L.R. 408; [1958] 1 All E.R. 454 (C.A.)

Rent Acts—Act of 1957*—recovery of possession—greater hardship—whether " greater hardship " proviso in Act of* 1933 *repealed.*—The Court of Appeal has now pronounced upon a point of controversy, upon which county court judges have been divided, namely, whether the " greater hardship " proviso in paragraph 1 of the First Schedule to the Act of 1933 has been repealed by paragraph 21 of the Sixth Schedule to the Act of 1957. They held that the " greater hardship " proviso still applies, since it is expressed as a proviso to the whole Schedule and not to paragraph (h) of the Schedule alone. The new paragraph (h) set out in the Act of 1957 in effect does no more than substitute a new date.

Upon the facts of the case, however, it was held that a court could not reasonably come to the conclusion that the tenant, upon whom the burden of proof lies, had established a case of greater hardship on his side. If it is just a matter of weighing the balance of hardship, that is a matter upon which the decision of the county court judge is final. But in this case there was only one reasonable and possible conclusion on all the evidence, since the landlord had made out a very strong case of domestic hardship, and the tenant, for his part, had not shown that he had made any great effort to obtain other accommodation at all.

Hardie v. *Frediani* [1958] 1 W.L.R. 318; [1958] 1 All E.R. 529 (C.A).

Rent Acts—recovery of possession—house reasonably required for landlord's daughter—other tenants of part of house occupied by landlord—movability of other tenants—whether relevant consideration.—The landlord in this case had living with him in his four-bedroomed house, as well as his wife and son, his daughter, aged 22, who was expecting a baby, and his daughter's husband. In addition one living room and one bedroom in the same house had been let to another married couple. The landlord satisfied the county court judge that he reasonably required another dwelling house, which he owned, as a residence for his daughter and her family: but the judge held that even so it was not reasonable to make the order, since, if the married couple in part of the landlord's house moved, there would be plenty of room for the daughter and her family, and the circumstances of the defendant tenant were such that, if anybody had to move, it was only right that the married couple should do so. The Court of Appeal agreed that this was a relevant factor to be taken into account, and held that it could not be said that there was no evidence to support the judge's conclusion. The question of reasonableness is a question of fact to be determined upon a consideration of all the relevant circumstances of each case, including in this case the fact that the married couple might themselves be in a position to rely upon the Rent Acts.

Betty's Cafés, Ltd. v. *Phillips Furnishing Stores, Ltd.* [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607 (H.L.)

Landlord and Tenant Act, 1954*—business premises—recovery of possession—landlord's intention to reconstruct—relevant time—landlord's intention to occupy for his own purposes.*—This case has now come to the end of its long journey through the courts (see Vol. 20, p. 334, Vol. 21, pp. 169, 311). The House of Lords has by a majority upheld the decision of the majority of the Court of Appeal (noted at Vol. 21, p. 169) to the effect that it is sufficient for a landlord, who opposes the grant of a new tenancy upon the ground set out in section 30 (1) (f) of the Landlord and Tenant Act, 1954, to show that he has a fixed and genuine intention to demolish or reconstruct the premises at the date of the hearing. He need not show that the

necessary intention existed at the date when he served his notice of opposition. Section 26 (6) of the Act, in the view of Viscount Simonds L.C., Lord Morton of Henryton and Lord Somervell of Harrow, requires a landlord to state in his notice the ground upon which he will (in the future) oppose his tenant's application for a new tenancy. The time at which the intention is to be ascertained, in cases under section 30 (1) (f), is still in the future at the date of the notice, and past events are only relevant for the purpose of challenging the landlord's good faith in cases where that good faith is in question. They also accepted the definition of "intention" given by Asquith L.J. in *Cunliffe* v. *Goodman* [1950] 2 K.B. at p. 253. Lord Keith of Avonholm and Lord Denning considered that the statement in the notice that the landlord "intends" to demolish or reconstruct must also be true at the date of the notice. Lord Denning, however, did not regard the notice in this case as an untrue notice, since it was given in good faith, even though there was no resolution of the board of directors at the time, and subsequently ratified from the beginning by the resolution which was passed during the original hearing. Lord Keith of Avonholm (dissenting) agreed with the judgment of the Master of the Rolls in the court below.

It was also held that when once a landlord has established an intention to demolish or reconstruct under section 30 (1) (f), the fact that the landlord's sole object is to adapt the premises for the purposes of his own business is irrelevant. The decision of the Court of Appeal in *Fisher* v. *Taylor's Furnishing Stores, Ltd.* [1956] 2 Q.B. 78 was approved. See also *Craddock* v. *Hampshire County Council* [1958] 1 W.L.R. 202; [1958] 1 All E.R. 449, noted below.

Craddock v. *Hampshire County Council* [1958] 1 W.L.R. 202; [1958] 1 All E.R. 449 (C.A.)

Landlord and Tenant Act, 1954—business premises—landlord's intention to demolish—ancillary to main intention—right of landlord to possession.—The Court of Appeal held in this case (following *Fisher* v. *Taylor's Furnishing Stores, Ltd.* [1956] 2 Q.B. 78) that a landlord of business premises who establishes a genuine bona fide intention to demolish the premises, has established a valid ground of opposition to a new tenancy under section 30 (1) of the Landlord and Tenant Act, 1954, even though the intention to demolish is ancillary or subsidiary to some other purpose—in this case to let the cleared site to a tenant as part of an agricultural holding. The county court judge had reached the opposite conclusion relying on *Atkinson* v. *Bettison* [1955] 1 W.L.R. 1127; [1955] 3 All E.R. 340. But the exact ground of the decision in that case (as explained in *Fisher's* case) was that the proposed work was not "substantial" within the meaning of section 30 (1) (f) of the Act. The court did indeed give a warning in *Atkinson* v. *Bettison* against allowing a landlord, who is prevented by section 30 (2) from relying on section 30 (1) (g), to escape from his difficulty too easily by putting forward a specious or colourable case of demolition or reconstruction under

section 30 (1) (f). But they did not decide that the work of demolition or reconstruction must always be the main or primary purpose for which the landlord seeks to recover possession.

Fisher's case has since been approved by the House of Lords in *Betty's Cafés, Ltd.*, v. *Phillips Furnishing Stores, Ltd.* [1958] 2 W.L.R. 513; [1958] 1 All E.R. 607, noted above.

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5. *REVENUE CASES*

By David R. Stanford, M.A., LL.B., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Annotated Tax Cases* (A.T.C.) or *Taxation Reports* (T.R.).)

Forbes' Trustees v. *C. I. R.* [1958] T.R. 7 (Ct. of Sess.)

Income Tax—Taxation of managing director—Share option

Statutory provision: Income Tax Act, 1918, Sched. E, r. 1 (now Finance Act, 1956, Sched. II, para. 1).

Point: When a taxable benefit is received by an officer or employee of a company from the company, the date of receipt is of importance as such fixes the correct year in which the same may be assessed upon the officer or employee concerned. This may affect not only the amount of the tax which is exigible, but also by reason of the limit placed upon the time within which an assessment may be made, namely six years in the absence of fraud or wilful default, the assessability of the benefit concerned. It has been long settled that profits within Rule 1 of Schedule E denote something which the recipient can turn to pecuniary account. It is the ability to derive pecuniary advantage from the benefit which renders it taxable and hence no tax is exigible in respect of the benefit until that ability accrues. For the first time the question of whether an option given to a director to subscribe for shares at a fixed figure caused a taxable profit to arise at the date of grant of the option, or at the date when it was exercised, was directly in issue. The share option in its terms was non-assignable and no pecuniary benefit could result until it had been exercised. It followed therefore that no tax became exigible on the benefit being the value of the shares over and above the amount to be subscribed, until the option had been exercised. This decision takes the law slightly farther than the case of *Weight* v. *Salmon* (1935) 19 T.C. 174, where the time of exercise was held to be the moment of accrual of taxation liability, the option in that case being merely an offer by the company and revocable by the company at any time prior to exercise.

Facts and Decision: Mr. Forbes served the company as managing director and under his service agreement, in addition to salary and

commission, he was entitled, so long as he remained managing director of the company and of a second company, to apply for and be allotted shares in either of the companies on payment in cash of their par value. The director did not control the company. Although this option was granted in 1944 he did not exercise it until 1946. He was assessed to tax on the difference between their value at the date of exercise of the option and par value. Mr. Forbes appealed, contending that the correct year of assessment was 1944, when the option was granted, a year out of time for assessment. The Special Commissioners upheld the assessment and Mr. Forbes appealed.

Held: that the assessment was correct. There was no pecuniary value in the mere right which he got by virtue of his service agreement. That right could not be disposed of by him. It was a personal right exercisable subject to certain conditions, one of which was that he remained managing director. Some stress was laid in the judgments on the condition that he remained managing director and the necessity of his finding cash equal to the par value in order to obtain allotment of the shares. The case therefore cannot be taken as finally deciding by implication that if an assignable option under which some price is to be paid or some condition fulfilled, the date of grant of the option is the relevant date for taxation of the benefit. The doubt thus left is in line with that raised by the *obiter dicta* in *Bridges* v. *Hewitt* (1957) 37 T.C. 289, where the actual benefit was held non-taxable but the view expressed that had it been taxable the moment of receipt of shares, rather than the moment when the right to receive the shares in the future accrued, would have fixed the correct year of assessment.

Potter v. *C. I. R.* (1958) T.R. 55

Estate Duty—Gift inter vivos—*Dutiable property*

Statutory provisions: Customs and Inland Revenue Act, 1881, s. 38 (2) (a); Customs and Inland Revenue Act, 1889, s. 11 (1); Finance Act, 1894, s. 2 (1) (c).

Point: Where a person makes a gift and dies within five years of the making of such gift, estate duty is payable on such death on the "property . . . taken" on the gift being made, such property being valued for estate duty purposes at the date of death. Prior to the coming into force of the Finance Act, 1957, the ascertainment of what property was dutiable fell to be determined solely by reference to the words quoted above, namely the "property . . . taken" on the gift in conjunction, so far as they might be relevant, with the definition sections in the Finance Act, 1894. By section 38 of the 1957 Act, a complicated definition is now applied to property comprised in a gift but no change in the law was made in respect of gifts of sums of money in sterling or any other currency, which were not settled by the gift. It is thus still of importance to determine whether the original gift, if absolute, was of cash or some other property.

The present case determines that a strict construction must be put upon the words "property . . . taken" in that the property taken must be property belonging to the donor prior to the disposition. The

fact that the property actually handed over is designated for application in a particular manner and that the donee is bound to apply it in that manner does not change the nature of the subject-matter of the gift.

Facts and Decision: This case, which was determined on the pre-1957 law, concerned a gift effected in the following way. The donor handed to the donee a cheque for £10,000 for the express purpose of enabling the donee to pay for an allotment of shares in a company for which the donee had already applied. The donor having died within five years of the gift, the donee contended that the gift was of the shares allotted (subscribed for with the £10,000) and not the £10,000, for the shares had fallen in value by the date of the donor's death. The donee sought to distinguish the case of *Sneddon* v. *Lord Advocate* [1954] A.C. 257 on the basis of the oft-quoted *obiter dicta* of Lord Reid in that case ([1954] A.C. at p. 280): "One can figure a case where the donor hands over money with instructions to buy a particular investment with it and the taker is obliged to follow those instructions. In such a case it might be said that the real subject of the gift is that investment." He further contended that, if the gift was of the shares allotted, such was property in which the donor never had an interest and that therefore the dutiable property was not aggregable with the remainder of the deceased's estate for the purpose of ascertaining the rate of duty.

Held: That the subject-matter of the gift was £10,000 and aggregable with the remainder of the estate. It was clear that the only thing with which the donor parted was a sum of cash. What the donee received was a sum of cash which he was bound to use to pay for shares, which shares he subsequently received. Lord Thomson regarded the statute as contemplating only the simple situation that a gift must be the same at both ends, namely, what leaves the donor is received by the donee, and the only property which satisfied this test was the sum of £10,000, although it was fettered in the hands of the donee. Lord Patrick noted that "the section is concerned with the disposition by the deceased person, a disposition of property belonging to him and which is deemed to pass on his death as if it had never left his estate." This again was the sum of £10,000. He held that what the section was concerned with was property solely belonging to the deceased, which he had given away, and not with subsequent use of that property. Lord Mackintosh agreed with Lord Patrick's view, but further noted that the gift was complete prior to the shares being subscribed for, and the fact that there was a fetter on the use by the donee of the money could not affect the liability by reference to the gift and strongly deprecated any possibility of having regard to the substance rather than the form in a taxing statute.

The donee's claim therefore failed and the question of aggregation had his claim succeeded did not fall to be decided. However, Lord Mackintosh expressed the view that if it was the shares and not the money which was dutiable, then they would have been aggregable, for if the shares had been taken under a disposition made by the deceased (which by hypothesis they would have been had they been dutiable) the deceased must have had an interest in those shares

which he was able to dispose of. Lord Blades, who dissented (following the above-quoted dictum of Lord Reid), held that the shares were dutiable and not aggregable, but gave no reasons for considering the shares not to be aggregable.

Fry v. *C. I. R.* [1958] 2 W.L.R. 673; [1958] 1 All E.R. 819 (Ch.D.)

Estate Duty—Interest in expectancy—Falling into possession

Statutory provisions: Finance Act, 1894, ss. 1, 2 (1) (a), 7 (6), 22 (1) (j).

Point: Where an interest in expectancy, which includes an estate in remainder or reversion whether vested or contingent, forms part of the estate of the deceased the person accountable for duty thereon may elect to pay the duty when the interest " falls into possession." For the purpose of ascertaining the rate of duty if election is made for such deferred payment, the interest must be valued at the date when it falls into possession. If the interest in expectancy is purchased by the owner of the estate prior to the interest, so that a merger occurs, after the death of the deceased, nevertheless the interest in expectancy will fall into possession at the date when present enjoyment of the property would have been obtained by the holder of the interest, had no purchase taken place. In consequence, the merger of the expectant interest before it falls into possession does not prevent estate duty being exigible by reference thereto.

This case does not directly affect the rules appertaining to the liability to estate duty of the estates of the tenant for life and remaindermen where the former purchases the interest of the latter, whilst both are alive, or the liability to estate duty of the fund in which such interest existed. The beneficial effect of a life tenant purchasing the reversioner's interest is, however, liable to be nullified by the Finance Act, 1958, in respect of all purchases after the Budget of April 15, 1958.

Facts and Decision: The residuary estate of a testator who died in 1918 was left by his will on trust for his daughter for life and after her death upon trust for her issue and in default of issue for her brothers, of whom there were four. One of the four brothers predeceased the life tenant, and his executors elected under Finance Act, 1894, s. 7 (6), to pay estate duty on his reversionary interest when it fell into possession. Later, the daughter, then being without issue and aged 83, purchased from the executors of the deceased brother his reversionary share and at the same time purchased the interest of the other three brothers. The executor of the deceased brother sought a declaration whether a claim for estate duty on the deceased brother's share should be made on the footing that his reversionary interest fell into possession on the purchase, whether estate duty would be payable at the death of the life tenant, or whether no estate duty would ever be payable on such reversionary interest.

Held: By Danckwerts J., that the interest in expectancy did not fall into possession on the purchase, but would fall into possession

on the death of the life tenant and at that date estate duty would be payable. The learned judge dismissed the plea relating to the difficulty of ascertaining the value at the life tenant's death, the whole trust fund having been transferred to the life tenant for her own use absolutely, regarding that as a future question.

The interest in expectancy in this case was no longer liable to be defeated in fact, having regard to the age of the life tenant, who was childless. For certain purposes, for example of perpetuity, the technical possibility of defeasance would be taken account of. His Lordship rejected reliance upon what he referred to as the highly artificial theory of the merger of estates and held that the interest in expectancy did not fall into possession on the purchase. The present right to possession was a right by virtue of the life interest and not of ownership of the interest in expectancy. The interest in expectancy would fall into possession of the estate of the life tenant on her death.

Escoigne Properties, Ltd. v. *C. I. R.* [1958] 2 W.L.R. 336; [1958] 1 All E.R. 406; (1958) T.R. 37 (H.L.)

Stamp Duty—Conveyance on sale—Exemption

Statutory provisions: Stamp Act, 1891, ss. 54 and 58 (4) and Sched. I; Finance Act, 1930, s. 42; Finance Act, 1948, s. 50.

Point: The House of Lords has now upheld the decision of the Court of Appeal (noted Vol. 21, pp. 172–173). The House was divided upon the true construction of section 42 of the Finance Act, 1930, Viscount Simonds and Lord Reid construing the section as applicable where an effect of the instrument is to convey or transfer a beneficial interest in property from one company to another and holding that there can be no investigation as to what is the substantial effect. This view did not, however, prevail, as the majority of the court held that such conveyance must be the complete effect of the instrument and not merely one of the effects. Their Lordships were, however, unanimous in holding that whether or not exemption was gained under section 42, nevertheless such exemption would be lost by virtue of the Finance Act, 1938, s. 50. That section removes from the exemption instruments "executed in pursuance of or in connection with an arrangement whereunder . . . (b) the beneficial interest in the property was previously conveyed or transferred directly or indirectly by" a person other than the relevant companies. They rejected the distinction which had found favour with Romer L.J. that a sale without conveyance did not operate as a transfer *by* the vendor.

The differing views with regard to the construction of the Finance Act, 1930, s. 42, reflect strongly a variation in the method of approach. The construction favourable to the taxpayer was reached on a strict construction of the wording of the section, whereas that against the taxpayer, which prevailed, necessitated some reliance upon the general intendment of the legislature in passing the section. In particular, Lord Denning had regard to what the object of the legislature had been in passing section 42, and placed weight upon "the sort of thing Parliament had in mind" when passing the section.

THE LIBRARY

Encyclopedia of Housing Law and Practice. General Editor, Percy Lamb, Q.C. London: Sweet and Maxwell, Ltd. (£7 7s. 0d. including 1958, September, release).

This loose-leaf book is an outstanding contribution to the ever-widening field of specialist books on local government subjects. It is produced in an excellent loose-leaf binder and is most carefully planned to permit the regular interleaving of new pages as periodical releases bring the work up to date (£2 2s. a year).

Some practitioners have a prejudice against all loose-leaf books, for various reasons. But it is clear that there is a need for something of this sort in the case of a subject which takes 1,150 pages to expound. Few aspects of ordinary life are more vital than housing, and this is the reason why no year passes without Parliament making some new provision for the good of the community, but alas to the confusion of the lawyers!

The general editor is assisted by a distinguished staff of editors, including Mr. R. D. Stewart-Brown, Q.C. The *Encyclopedia* comprises the Housing Act, 1957, and those provisions of earlier Acts still in force. In addition the Acts dealing with compulsory acquisition and compensation are included. The very comprehensive sections devoted to rules and orders and to ministerial circulars are invaluable. Some may think that such a book is primarily for local government officers, but this would be a great mistake. Too few solicitors in private practice recognise the importance of checking up on the relevant orders and circulars in a local government problem. When tiger hunting one must first and always study the habits of the tiger . . . or be eaten! Most firms have to resist attempts to take their clients' property and have to advise on improvement grants, slum clearance, compensation problems and to negotiate loans from local authorities.

It is perhaps a pity that the Rent Acts were not included as a main subject, or at least those aspects which are closely related to the Housing Acts. Certificates of disrepair give rise to many problems which concern houses within the ambit of those sections of the Housing Act, 1957, dealing with repairs, demolition and slum clearance. Again and again one finds oneself turning from the Rent Acts to Housing Acts and back again, and cursing both. The *Encyclopedia* gives full references to the Rent Acts in notes on sections of the Housing Acts, but a special section devoted to the Rent Acts would be invaluable.

A number of specific checks showed that the *Encyclopedia* is skilfully edited. The notes are comprehensive and helpful, even to the extent of drawing attention to articles in legal journals and references in other books on points of difficulty. There is, however, one paragraph which might be considered further. This is paragraph 0–59 on page 1027 in the introductory general statement which contains a short explanation as to maximum rents of houses the subject of improvement grants. The paragraph could well be misleading to the unwary since it contains no reference to the 8 per cent. of landlords' cost increase. This point is dealt with adequately elsewhere in the book. In addition, on page 1026, there is a statement that one-half of professional fees in connection with improvement grants "will be payable." The fraction payable is not always one-half as not all local authorities pay the maximum grant.

There is one drawback, which may well be inherent in a loose-leaf encyclopedia. The indexing is by reference to paragraph numbers instead of to pages. The cross references in the notes to the statutes do not give paragraph or

page numbers. This is a disadvantage because it takes much longer in a book of this large size to find the matter cross referred to than if page numbers are given. But against this one must weigh the great advantage of being able to keep the *Encyclopedia* up to date for years to come.

R. H. M.

Overseas Trade Corporations. David R. Stanford, m.a., ll.b., Barrister-at-Law. London: Sweet & Maxwell, Ltd. xx, 329 and (index) 9 pp. (£1 15s.)

This is number 1 of a new series of *British Tax Review* guides and is also perhaps the most ambitious attempt to expound Part IV of the Finance Act, 1957, which has so far been made. The author has striven mightily with an intractable subject, with little aid other than the *Hansard* reports of the progress of the Bill through the House of Commons, and he has something to say on every item of the numerous provisions, as well as on other topics like residence and double tax relief. However, I found the result disappointing. The chief fault is lack of clarity. In tax studies it is a familiar process to stare uncomprehendingly at a Finance Act and then to turn to the textbook for enlightenment. With this book the process is too often reversed. The author modestly thanks the proof reader who "firmly trapped many of the author's hares and forced the northern light into the fog of a cockney's English." I could wish the northern light to have been more penetrating or the fog less dense. The book abounds in sentences like this (p. 188): "This disallowance of losses sustained before achieving O.T.C. status as the subject-matter of relief in subsequent years is the corresponding provision to Finance Act, 1957, s. 25 (2), which prevents relief being given for a loss on trading income of an O.T.C. by it being debited against investment income of the O.T.C., either for the year in which the loss occurs or in subsequent years during which the company remained an O.T.C."

Part IV of the Finance Act, 1957, like much other tax legislation, is complicated largely because it clothes in legal language some very simple arithmetical concepts. The function of a "guide" is surely to lay bare these concepts by arithmetical examples. There is not a single example in the whole book. Anyone can paraphrase an Act without making it much clearer; indeed, without himself necessarily comprehending its meaning, though this accusation cannot be levelled at the author. Setting out examples has the double function of ensuring that the author really does comprehend, and of helping the reader to reach the same comprehension. In the present case the author might have avoided some inaccuracies in his exposition of the income tax repercussions of a loss of O.T.C. status (p. 192) if he had worked out some examples.

An air of unreality in the book is increased by the references to the Commissioners of Inland Revenue in terms which imply that these august functionaries will be steeped in the day-to-day administration of the new law. The brunt will, of course, fall on the shoulders of the local inspector of taxes, a key official who is, nevertheless, not mentioned in the book.

P. W.

Brighouse's Short Forms of Wills. By Edward F. George, ll.b., Solicitor, and James H. George, ll.b., Solicitor. London: Sweet & Maxwell, Ltd. xv, 133 and (index) 4 pp. (£1 1s.)

Brighouse on *Wills* has always steered a middle course between the Scylla and Charybdis of testamentary draftsmanship: between what Gavan Duffy J. has called "the proclivity of the lawyer for screening his arcana from the vulgar," and the belief (happily still cherished by some laymen) that idiomatic English is necessarily clearer than the obscurantism of legal jargon. The latest edition of Brighouse adheres to drafts which largely achieve the virtues of

conciseness, clarity and comprehensibility. The type is eminently legible and the book is well produced.

All the alternative clauses for vesting of remainders appear: vesting at the testator's death (p. 55, which is followed by an ultimate gift over), vesting at the life tenant's death (pp. 30, 42, 128—but unaccountably none of these is followed by an ultimate gift over), vesting in a class arising between the testator's death and the life tenant's death (pp. 75, 80), and a Wills Act, 1837, vesting (p. 105), although there is a warning against relying on section 33 (p. 64). Again, most of the usual issue clauses are to be found, but only one (p. 80) covers children (not remoter issue) of a son dying under 21, although in about half the forms property is left to children who attain 21 or being female marry under that age.

In forms generally so successful in avoiding verbiage, the reader is jarred by a few relics of old-fashioned terminology; "my aforesaid farm stock" and "subject to the aforesaid trusts" (pp. 118, 121), and a habendum in a bequest of shares on (p. 109). The expressions "my residuary estate" and "the Trust Fund" seem to be used almost interchangeably, *e.g.*, the former appears in Common Form Clauses 31, 32 and 34, and the latter in Common Form Clauses 28 and 30. The index (which omits the devise on p. 63) would be more useful if it enabled the practitioner to identify the alternative vesting clauses.

These are minor matters which do not seriously detract from the value of the book. There is a welcome absence of footnotes, and the explanatory notes prefacing some precedents are useful without being burdensome. This is essentially a desk-side book for the practitioner, embodying in compact form the forms most commonly required in practice, and will be found useful not only in drafting wills but also in advising testators as to how most effectively to frame their dispositions, particularly in regard to the incidence of taxation.

R. G. R.

Family Law. E. L. Johnson, Barrister-at-Law. Sweet & Maxwell, Ltd. 1958. 316 pp. (£1 15s.)

It is a pleasure to welcome such a sound and readable work on a subject which is becoming increasingly popular as a University course as well as of great practical importance. Besides the hard core of matrimonial causes which are the concern of the Divorce Division, the learned author deals with many of the consequences of marriage in common law and equity and with property disputes between husband and wife, family provision and other matters of interest to the property lawyer. Despite the modest size of the work it deals with all the knottiest problems, has a vigorous analysis and critique of the cases, and has copious footnotes, including references to books and periodical literature. The general effect is one of great vigour, and yet of maturity of judgment. It is also very topical and up to date. The reader may be puzzled to find the deserted wife's licence dealt with under separate chapters, but this is explained by the author's scheme, which is quite sound. On page 147 the reference to the Addendum should be "*ante*, p. xxxix," not "*post*, p. 319." At the foot of page 10 a cross-reference to the 1950 Act might prevent confusion early on. Page 16, n. 81, might cross-refer to page 57, to explain what jactitation of marriage is. On page 141, line 10, "incidence" should probably be "incident." The book is well printed and brought out and I hope it gains the success it deserves.

A. K. R. K.

Dicey's Conflict of Laws. 7th ed. By J. H. C. Morris, D.C.L., and others. Stevens & Sons, Ltd. cxxiv, 1116 and (index) 64 pp. (£6 6s.)

Dicey's method of setting out a rule, followed by commentary and illustrations, does not appeal to everyone, but it has one considerable advantage: it

is not easy to evade difficulties and obscurities in the law by woolly verbiage without its becoming apparent. By setting forth rules in clear terms and then showing that these rules were deducible from the cases and not from some preconceived views of what the law ought to be, Dicey made his work pre-eminent in its field, so much so that it is now the solitary authoritative English textbook on the subject for practitioners. When there is a team editing a standard work there is always a fear of raggedness and inconsistency, but happily not only does that fear prove unfounded but defects in the fifth edition, by Professor Berriedale Keith, have been eradicated. The long series of appendices, corrections, as it were, to the main text, have disappeared. The vast amount of new material has been fully digested and worked into the text in such a way as to remove any appearance of patchwork.

The editors are no doubt quite familiar with the various academic theories, whether crackpot or not, but changes of view are made cautiously and only when there is real support to be found in the cases. Thus, "matrimonial domicile" clearly means the actual domicile at the time of marriage, though do not the editors rather flatter themselves when they say that the Appellate Division of the Supreme Court of South Africa adopted "our view" in *Est. Frankel* v. *The Master* [1950] 1 S.A.L.R. 220? Again, they do not accept that capacity is governed by the proper law of the contract, but by the law of the country with which the contract is most closely connected (Rule 151), though a casual reading of Exception 1, page 524, might give a different impression. For the practitioner it is often of greater importance that a rule should be certain than that it should be ideal. The courts have said again and again that the parties are free to choose the system of law to govern their contract, and it is unhelpful to try to restrict this freedom. Though the editors have had to qualify this principle slightly, they have not sought to make any serious inroad into it.

If the editors' approach is, in our opinion rightly, conservative that is not to say that it is uncritical. They do not appear to have any marked enthusiasm for *The Rose Mary* [1953] 1 W.L.R. 246, which seems to be hardly consistent with a long line of authority; and *Lorentzen* v. *Lydden* [1942] 2 K.B. 202 is indulgently noted as doubtful. *Bank of Africa* v. *Cohen* [1909] 2 Ch. 129, which has now stood for nearly half a century, comes in for a good deal of criticism, which seems a little hard. Roman-Dutch law, maintaining provisions established by the Emperor Constantine for the protection of married women, forbids them to guarantee their husband's debts without express renunciation of the provisions. It is now suggested that if the creditor and married woman can come to this country not only can they evade the provisions of this law with regard to movables but also with regard to immovables subject to Roman-Dutch law.

It can hardly be said that the conflict of laws receives adequate consideration in this country. For example, the Principal Probate Registry have issued grants quite recently stating that the deceased died domiciled in South Africa instead of stating the Province; and how many Polish couples were married either in community of property or under a régime giving the husband a usufruct in the wife's property and have subsequently been divorced here without anyone paying the slightest attention to the proprietary rights of the parties? Perhaps less frequent, but often enough to be remarked on, is the practice of English solicitors of drawing wills for persons domiciled abroad with blithe disregard of how the will may operate and without even stating by which system of law the will is to be interpreted. There is really no excuse for all this: the light of Dicey's torch burns as strongly as ever. For what you get, the price is very reasonable. Finally, the work is very well produced.

E. F. G.